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A DIGEST
OF THE LAW OF
BILLS OF EXCHANGE.

EIGHTH EDITION.

A DIGEST
OF THE LAW OF
BILLS OF EXCHANGE,
PROMISSORY NOTES, CHEQUES,
AND
NEGOTIABLE SECURITIES.

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PREFACE

TO THE EIGHTH EDITION.



IN the present edition, the cases decided on the Bills of Exchange Act since the last edition was published have been added, and the notes have been revised and enlarged.

Two Acts have been passed which refer to bills of exchange. The Bills of Exchange Act, 1914, makes temporary provision for bills delayed or lost owing to war. The Bills of Exchange (Time of Noting) Act, 1917, extends the time for noting dishonoured bills, and amends sect. 51 (4) of the principal Act.

International Conferences were held at the Hague in 1910 and 1912 with a view to unifying the various systems of bills of exchange law prevailing in the main commercial countries of the world. Thirty-eight nations were represented. The Right Hon. F. Huth Jackson and myself were the British delegates. The result of the Conference was the preparation of a Uniform Law, or, as it was finally called, a Uniform Regulation. The scheme of the Regulation was this:—

A Convention was drawn up under which each nation adhering to the Convention bound itself to enact the Regulation for its own territory. Certain articles specified in the Convention might be subject to modification to meet local requirements. Thirty-one nations adhered to the Convention. Nearly all these nations have been engaged during the last five years in fighting each other, but now that the War is over perhaps some or all of them will proceed with the promised legislation. Until further information is accessible it does not seem worth while to add to the size of this book by including the Uniform Regulation. The text of it, with an English translation, is included in the Report made by the British delegates to the Foreign Office, which has been published as a Parliamentary Paper, Commercial No. 11 of 1913 [Cd. 6680].

Great Britain and the United States, for reasons fully stated by the delegates, were unable to adhere to the Convention. Throughout the English speaking world a practically uniform system, founded on the common law, has now been arrived at, and any dislocation of this system would be highly inconvenient. But cordial support was given to the Uniform Regulation which is based on the continental laws, though in many cases it adopts the English rule. As the delegates say in their report

(p. 53):—The result of the adoption of the Uniform Regulation will be that “the present multiplicity of laws will be swept away, and the law relating to bills and notes will be reduced to two great systems, namely, the Anglo-American system which will apply throughout Great Britain and her colonies and dependencies and the United States, and the system of the Uniform Regulation which will apply to the rest of the commercial world.” No doubt as time goes the two systems will more and more approximate to each other.

In the United States the Bills of Exchange Act has given rise to an interesting experiment. Great inconvenience was found to result from the different laws enacted by different States with reference to negotiable instruments, and by the varying interpretations put on the common law by some fifty State Courts of ultimate resort. The United States Commission on Uniform State Laws, therefore, took the matter in hand, and under their supervision, Mr. Crawford, of the New York bar, drew up a draft Negotiable Instruments Law, which largely follows the English Act in its wording, though the arrangement is different. This Law has now been enacted by more than forty States and Territories in the Union, and it is hoped that in time it will be adopted by the whole of the States, so that uniformity of law will be secured throughout the

Union. In the present edition I have freely referred to the American Code, as enacted for the State of New York in 1897, especially when its language is identical with that of the English Act. The cases decided on it will be useful to us. The decision of an American Court, trained in the common law, and interpreting a statutory provision common to both countries, must always be relevant when a similar question arises in England, though it is not, of course, a binding authority.

M. D. C.

July, 1919.

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LIST OF ABBREVIATIONS.

- Chitty—Chitty on Bills of Exchange. 11th edition. 1878.
- Daniel—Daniel on Negotiable Instruments. New York. 4th edition. 1891.
- French Code—French Code de Commerce of 1818.
- German Exchange Law—German General Exchange Law of 1849.
- Indian Act—Indian Negotiable Instruments Act, 1881.
- Nouguier—Nouguier's "Lettres de Change et Effets de Commerce." Paris. 4th edition. 1875.
- Pothier—Pothier, *Traité du Contrat de Change*. Paris. 1847.
- Story—Story's Commentary on the Law of Bills of Exchange. 4th edition. 1860.

INTRODUCTION TO THIRD EDITION.



Soon after the publication of the Second Edition of this Digest the law relating to bills, notes, and cheques was codified by the Bills of Exchange Act, 1882. For the most part the propositions of the Act were taken word for word from the propositions of the Digest. In the Introduction to the Second Edition it was pointed out that the general propositions of the Digest could only be considered as law, in so far as they were correct and logical inductions from the decided cases which were cited as illustrations. Now the position is reversed. The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. The illustrations, therefore, must always be tested by the language of the Act itself.

Plan of the
work.

In the notes to the Act I have carefully pointed out the few provisions which were deliberately intended to alter the law. When a proposition in the Act appears to be of wide scope, I have added illustrations taken from decided cases. When a proposition appears to be of narrow scope, I have merely given a reference to the cases which were before me when drafting it. It may be said that the Act should be left to speak for itself. I am well aware that there is no necessary connection between the intention of the draftsman and the

intention of the Legislature as deduced by the Courts from the terms of a statute. Still, in the present case, there will be a strong disposition on the part of the Courts to construe the Act as declaratory; and it may be useful to the profession to be referred from the abstract propositions of the Act, to the concrete facts which gave rise to them. As Mr. Justice Holmes, in his admirable work on the Common Law, observes (p. 27), "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."

Codification.

The Bills of Exchange Act, 1882, was the first enactment codifying any branch of the Common Law which found its way into the Statute Book. It has now been followed by the Partnership Act, 1890, which was drafted by Sir Frederick Pollock.* But as a Code is still somewhat of a novelty in English law, it may be of interest to refer to the conditions under which the experiment was successfully carried out, and to consider how far it can or ought to be repeated as regards other portions of the law. Of late years several attempts at codification have been made, but from various causes they have mostly proved unsuccessful. The success of the Bills of Exchange Bill depended on the wise lines laid down by Lord Herschell. He insisted that the Bill should be introduced

* For an account of that Act, see the Introduction to Pollock on Partnership. And see also the Sale of Goods Act, 1893, and the Marine Insurance Act, 1906, which I subsequently drafted.

in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying Bill must bridge over if it aims at anything like completeness. Still, in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's Digest of the Law of Evidence, and Sir F. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a Digest of the law relating to them. I found that the law was contained in some 2,500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions, and to inquiry as to the usages among bankers and merchants. As the result, a good many propositions in the Digest, even on points of frequent occurrence, had to

be stated with a (probably) or a (perhaps). Some two years after the publication of my Digest, I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Sir John Hollams, the well-known commercial lawyer, who was present, pointed out the advantages of a Code to the mercantile community; and, mainly I think on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a Bill on the subject. The draft of the Bill was first submitted to a sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority.* The Bill was then introduced by Sir John Lubbock, the President of the Institute. After it had been read a second time in the Commons, it was referred to a strong Select Committee of merchants, bankers, and lawyers, with Sir Farrer Herschell as chairman.† As the Scotch law of negotiable instruments differed in certain particulars from English law, the Bill was originally drafted to apply to England and Ireland only. The first work of the Select Committee was to take the evidence of Sheriff Dove-Wilson of Aberdeen, a well-known authority on Scotch Commercial Law. He pointed out the particulars in which the Bill, if applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant.

* Mr. Billingham, of the London and Westminster Bank, and Mr. Slater, of the London and County Bank, undertook the brunt of the work.

† The Committee included Sir Farrer Herschell (afterwards Lord Herschell), Q.C.; Sir John Lubbock (afterwards Lord Avebury); Mr. Asher, Q.C.; Mr. Cohen, Q.C.; Mr. Reid, Q.C. (afterwards Lord Loreburn); Mr. Whitley, Mr. T. C. Baring, Mr. R. B. Martin, Mr. Orr-Ewing, Mr. Jackson (afterwards Lord Allerton), and Sir Charles Mills (afterwards Lord Hillingdon).

The Committee thereupon resolved to apply the Bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on the other points the Scotch rule was either adopted for England, or the English rule applied to Scotland. A few amendments in the law were made when the Committee was unanimous in their favour, but very wisely no amendments were pressed on which there was a difference of opinion. Sir Farrer Herschell reported the Bill to the House, and it was read a third time and sent up to the Lords without alteration. In the House of Lords it was again referred to a Select Committee with Lord Bramwell for chairman.* A few amendments were there inserted, mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the Bill passed without opposition. The Act has now been in operation for more than eight years, so that some estimate can be formed as to its results. Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the laws of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is seldom necessary to go beyond the Act itself. It must also be an advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But as it is, the Act, as yet, has given rise to very little litigation.

* The Committee included the Lord Chancellor (Selborne), Lord Bramwell, Lord Fitzgerald, Lord Balfour of Burleigh, and Lord Wolverton.

I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Lord Herschell. Let a codifying Bill in the first instance simply reproduce the existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Assuming then the possibility of further codification, the question arises whether its extension is expedient. All the Continental nations have codified their laws, and none of them show any signs of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing codes. In India a good deal of codification has been carried out, and public and professional opinion seems almost unanimous in its favour. The Bills of Exchange Act, 1882, has been adopted by New Zealand, Victoria, New South Wales, South Australia, Queensland, Tasmania, and with slight modifications by Canada.

Foreign laws. On doubtful points frequent reference is made in this Edition to American cases* and Continental Codes and writers. In mercantile matters, when the law is uncertain or authority wanting, there is an increasing tendency to

* In the present Edition no attempt has been made to keep the American cases up to date. They are now so numerous, and conflicting, that for the purpose of showing what American law is reference must be made to American text books, such as *Parsons* on Bills and Notes or *Daniel* on Negotiable Instruments, and Mr. Crawford's edition of the New York Negotiable Instruments Act of 1897.

refer to foreign Codes and laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts. Mr. Justice Story, in his judgment in *Swift v. Tyson* (16 Peters, 1), gives forcible expression to the principle. He says, "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr. 887), to be in a great measure, not the law of a single country only, but of the whole commercial world. Non erit lex alia Romæ, alia Athenis, alia nunc, alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit." Lord Blackburn, in a Scotch appeal concerning a cheque, lays down a similar rule. "There are," he says, "in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. . . . We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases, when they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurist, provided they bore upon the point."*

An American decision, it is needless to say, is not a binding authority in this country, but, if well reasoned, it is always considered with respect by our Courts.† Many of the American judgments are very valuable as expounding and testing the principles of English decisions. An English case there, like an American case here, is only an authority in so far as it appears to be a correct

* *McLean v. Clydesdale Bank* (1883), 9 App. Cas. at p. 105.

† See per Cockburn, C.J., in *Scaramanga v. Stamp* (1880), 5 C. P. D. at p. 303, C. A.

deduction from the general principles of common law and the law merchant which prevail in both countries alike.

When the subject-matter of a section of the Act is dealt with by the French "Code de Commerce," or the German "General Exchange Law, 1849," their respective provisions are compared. If they agree, a mere reference to the corresponding sections is given. If they differ, the points of difference are given in a note. A vast number of the bills circulated in England are foreign bills. It seems useful, therefore, to indicate the main points of divergence which may give rise to a conflict of laws. The French Code is of particular interest. Although enacted more than eighty years ago, no substantial alteration has been made in it by subsequent legislation. For many years it was the model of nearly all the Continental Codes. For instance, the Belgian Code de Commerce of 1872 enacted for Belgium the provisions of the French Code regarding bills and notes, with a few slight modifications borrowed from Germany, and the addition of three or four articles which embodied the result of French judicial decisions on the construction of the Code. Of late years, however, there has been a tendency to adopt the somewhat wider provisions of the German Exchange Law. Until 1883 the Italian Commercial Code was closely modelled on the French, but the new Italian Code which came into force in 1883 has departed from the French model as regards bills and notes, and has substantially adopted the provisions of the German Exchange Law. Again, the Portuguese Code of 1833 was mainly founded on the French Code. But the Code of 1888 in many respects departs from the French model, and has in the main followed the German Exchange Law, though a few provisions seem to be borrowed from the English Act. I believe the Hungarian

Code of 1875, the Scandinavian laws of 1880, the Swiss law of 1881, and the Spanish Code of 1885 have also departed from the French idea and followed the German lead. French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide. (See per Parke, B., in *Foster v. Dawber*, 6 Exch. 852.) The "Code de Commerce," to a great extent, embodies and enacts the opinions of Pothier, whose authority, says Best, C.J. (in *Cox v. Troy*, 5 B. & Ald. 481), "is as high as can be had next to the decision of a Court of Justice in this country." On doubtful points not dealt with by the Code, reference is occasionally made to Pothier, and also to the exhaustive treatise of M. Nouguiet (Des Lettres de Change et des Effets de Commerce, 4th ed. 1875), which gives the latest results of French law.

The German General Exchange Law of 1849 (slightly modified, 1869) is important in two respects. First, it is the most elaborate and carefully worked out of the foreign Codes, and it appears to be the model to which the other Continental states (with the exception of France) are now assimilating their laws. Secondly, it is an international and not merely a national Code. All the German states, including Austria, have adopted it, and the terms of its adoption are these: Each state is at liberty to supplement it by additional laws of its own, but such laws are not in any way to contradict or override it. M. Nouguiet, in the work above referred to, gives in French the text of the Exchange Law, and also the various supplementary laws passed by the different states.

It would probably be very advantageous to the commercial world if this principle of an International Code

could be further extended.* The difficulties of carrying it out do not seem insuperable, though doubtless they would be great. The provisions of such a Code would have to be settled by agreement, and then each state would enact it for its own territory. In the case of England it would probably be necessary to confine its operation to foreign bills, that is to say, to bills drawn or payable abroad. Our law, as regards foreign bills, does not widely diverge from the law of other commercial countries, and it diverges chiefly by allowing greater latitude than is adopted in practice. Occasional reference is also made to the Indian Code (Act XXVI. of 1881, as amended by Act II. of 1885), which in substance reproduces the English law as it stood in 1881. In a work like the present, it is thought it would be waste of space to carry references to foreign laws or authorities any further, but it may be worth while to mention where they can be found.

Borchardt (*Vollständige Sammlung der geltenden Wechsel- und Handels Gesetze aller Länder*, 1871) collects the statutory enactments of all countries relating to Bills of Exchange. Part I. gives a German translation, Part II. the original text. More than forty countries have codified their law on this subject; in fact, some English colonies and the United States seem to be the only civilized nations which have not done so. Since Borchardt's work was published, however, several Continental states have re-cast their laws relating to negotiable instruments. A new Commercial Code has been enacted for the Netherlands, and an official translation of the part relating to negotiable instruments has been published in England. [See Commercial, No. 30, of 1880,

* As to further developments on these lines, see Preface to this (the 8th) edition.

C. 2609.] M. Nouguiet, in a supplementary chapter to his work on Bills (*Des Lettres de Change*, 1875), compares the laws of the chief commercial nations with the French Code. The Comité de Législation Étrangère, under the direction of the French Ministry of Justice, are preparing cheap French translations of the various foreign laws relating to commercial matters. Several volumes have already been published with excellent introductions and notes. Having regard to our own insular isolation, I fear it will be long before any English government department undertakes similar useful work. M. Massé's "*Droit Commercial et des Gens*" is a valuable work on the conflict of laws—especially as regards bills. The latest American book, I believe, is Daniel on Negotiable Instruments, 1876. Story on Bills of Exchange, and Parsons on Notes and Bills, are also standard American works. Thomson on Bills of Exchange is the standard book on Scotch law, which, it must be remembered, differs materially from the English.

The origin and history of bills of exchange and other negotiable instruments are traced by Lord Chief Justice Cockburn in his judgment in *Goodwin v. Roberts*.* He says: "Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled '*Specimens of a Digest of the Law of Bills of Exchange*,' that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and

Origin and
history of bills
and notes.

* *Goodwin v. Roberts* (1875), L. R. 10 Ex. pp. 346—358. See further an interesting article by Mr. Jenks on "The Early History of Negotiable Instruments," *Law Quarterly Review*, vol. ix. p. 70.

who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. II. c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, 'the introduction and use of bills of exchange in England,' as indeed it was everywhere else, 'seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom.' With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure* (Cro. Jac. 6), in the first James I. Up to this time, the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan

Pragmatica in 1607. Savary, cited by Mons. Nouguiet, in his work 'Des Lettres de Change,' had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first, the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not." The law throughout has been based on the custom of merchants respecting them: the old form of declaration on bill used always to state that it was drawn "secundum usum et consuetudinem mercatorum." In the time of Chief Justice Holt, a controversy arose between the Courts and the merchants, as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by the stat. 3 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes. Again, in 1873, the Court of Queen's Bench were of opinion that documents other than bills and notes could not be endowed by custom with the incidents of negotiability. But the efficacy of custom was again upheld by the Exchequer Chamber in 1875, in *Goodwin v. Roberts*, where it was determined that foreign scrip might be rendered negotiable by custom, so as to pass with a good title, and free from all equities to a *bonâ fide* purchaser. The Court there say (p. 356): "While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal it is the less entitled to prevail because it may not have formed part of the law

merchant as previously recognized and adopted by the Courts." The House of Lords approved the decision in 1876. Though the law merchant is now recognized as part of the law of the land, the process by which this principle has been evolved is still in need of elucidation. Lord Blackburn, in an interesting digression in his work on Sale (2nd ed. p. 317), observes: "There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered in its own Courts in the Staple or else in the Star Chamber." After referring to a case in 13 Edw. IV. 9, he proceeds: "It is obvious that at that time the law merchant was a thing distinct from the common law. This accounts for the very remarkable fact that there is no mention whatever of bills of exchange or other mercantile customs, in our early books; not that they did not exist, but that they were tried in the Staple, and therefore were not mentioned in the books of common law. But as the Courts of the Staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law either fell into disuse or were adopted into the common law as the custom of merchants. How this great change was brought about does not appear; but though bills of exchange were in common use among merchants in the thirteenth century, the first mention of one in an English report is in Cro. Jac. in the beginning of the seventeenth century."

French and
English theory
of bills com-
pared.

The results of this formation of the law by custom are instructive. A reference to Marius' treatise on Bills of

Exchange, written about 1670, or Beawes' *Lex Mercatoria*, written about 1720, will show that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is, that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a Code by the "*Ordonnance de 1673*," which is amplified but substantially adopted by the *Code de Commerce* of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French Law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.* English

* This passage was written in 1878, when the first edition was published. The theory it advances is independently confirmed by the excellent Introduction to the Portuguese Commercial Code in the French edition, published by the "*Comité de Législation Étrangère*." See p. xxix., where it is said, "*La lettre de change, qui, à son origine, n'était destinée qu'à effectuer un paiement de place en place, en évitant les dangers de la circulation du numéraire, s'est considérablement modifiée et perfectionnée. Aujourd'hui elle remplace le*

law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will show how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise: see the definition of bill in Comyns' Digest*). In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange.† In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise.‡ In France it must be payable to order; if it

numéraire, et constitue entre commerçants, sinon l'unique moyen du payement, du moins le mode de libération le plus usuel. Nous sommes loin de l'époque où elle n'était considérée que comme un simple instrument du contrat de change et où l'on exigeait que le tiré en eût préalablement reçu la contrevaletur. . . . La lettre de change est devenue dans le nouveau code un simple contra *literis*, indépendant, valable par le seul fait des stipulations qu'il renferme et des signatures qu'il porte."

* "A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to A. or order for value received of B., and subscribes it."

† This rule was known as the rule of *distantia loci*. No distance was fixed by the Code, and the rule, therefore, was difficult to apply. See *Nouguier*, §§ 93—105. Gradually the French Courts came to consider this requirement of Art. 110 of the Code de Commerce as merely directory, and now it is expressly abrogated by the Law of 7th June, 1894. Italian Code, Art. 251, negatives the rule. See, however, Netherlands Code, Arts. 100, 101; Spanish Code, Art. 249.

‡ See *Stewart v. Hodges* (1692), 12 Mod. 36.

were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when indorsed in blank. In France an indorsement in blank merely operates as a procuration. An indorsement, to operate as a negotiation, must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve.

M. D. C.

January, 1883.

BILLS OF EXCHANGE ACT, 1882.

45 & 46 VICT. c. 61.

An Act to codify the Law relating to Bills of Exchange, Cheques, and Promissory Notes.

[18th August, 1882.]

PART I.

PRELIMINARY.

1. This Act may be cited as the Bills of Exchange Act, 1882. Short title.

The Bill as originally drafted applied only to England and Ireland. The clause excluding Scotland was struck out in committee. The Act therefore applies to the whole of the United Kingdom. Sect. 4 and sect. 83 (4) (inland and foreign bills and notes), and the consequential enactment, sect. 51 (2) (protest), apply also to the Channel Islands and the Isle of Man. The general rule of construction is that an English Act does not bind foreigners out of the jurisdiction (a), and of course an English Act cannot bind foreign courts. As to the effect to be given to foreign laws where they differ from English law, see sect. 72, *post*. Local extent.

The Bill as originally drafted was intended to reproduce the then existing law as exactly as possible, but certain amendments of the law were introduced in committee. Amendments of law.

(a) *Jefferys v. Boosey* (1854), 4 H. L. Ca. at pp. 935, 939; *Ex parte Blain* (1879), 12 Ch. D. 522; and note *Embiricos v. Anglo-Austrian Bank*, (1904) 2 K. B. 870; affirmed 1 K. B. (1905) 677, C. A., as to the local operation of sect. 24 concerning the effect of a foreign forged indorsement.

§ 1.

Provisions which alter the law are sect. 4 (2); sect. 7 (2) (3); sect. 8 (1) and (3); sect. 12; sect. 14 (1); sect. 15; sect. 18 (3); sect. 33; sect. 36 (3); sect. 39 (4); sect. 41 (2); sect. 44 (2); sect. 49 (6); sect. 51 (2); sect. 61; sect. 62; sect. 64; sect. 73; sect. 74; sects. 91—95; sect. 100.

Construction
of Act.

The Act is by its title a codifying Act, and the rule for its construction is thus stated by Lord Herschell:—"I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments, words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category" (b).

(b) *Bank of England v. Vagliano*, (1891) A. C. at p. 144, decided on sect. 7 (3), as to fictitious payee; cf. *Bristol Tramways Co. v. Fiat Motors, Ltd.*, (1910) 2 K. B. at p. 306, C. A. (Sale of Goods Act).

This Act deals only with bills, notes, and cheques. It has no application to other negotiable instruments, such as negotiable bonds or scrip. As to such instruments, see Chapter on Negotiable Securities for Money, *post*, pp. 362—380. § 1.
Negotiable scrip, bonds, &c.

As to bills and notes made by a corporation under seal, see sect. 91 (2), *post*. The enactments which regulate bank notes are expressly saved by sect. 97 (3) (c), *post*.

2. In this Act, unless the context otherwise requires,— Interpretation of terms.

“Acceptance” means an acceptance completed by delivery or notification. Acceptance.

As to delivery or notification to complete an acceptance, see sect. 21, *post*; and as to the requisites of a valid acceptance, see sect. 17, *post*; as to acceptance for honour, see sect. 65, *post*.

“Action” includes counter-claim and set-off. Action.

See sect. 30 (presumption of value); sect. 57 (damages), and sect. 70 (lost bill), which require this definition. For a full definition of “action” for High Court purposes, see sect. 100 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

“Banker” includes a body of persons, whether incorporated or not, who carry on the business of banking (*c*). Banker.

See sect. 60, *post*, as to forged indorsements on demand drafts, and sects. 73 to 83 as to cheques. Compare the definition of “banker,” given by sect. 29 of the Stamp Act, 1891, *post*, p. 396. As to the relations of banker and

(c) As to who is or is not a banker, see *Ex parte Coe* (1861), 3 De G. F. & J. 335; *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. at p. 193; *Re Shields Estate* (1901), 1 Ir. R. (Ch.) 172; and as to U.S., *Morse on Banking*, §§ 2-5; as to a building society carrying on an *ultra vires* banking business, see *Sinclair v. Brougham*, (1914) A. C. 398, H. L. See, further, note, *post*, p. 75.

§ 2.

customer, see *post*, p. 291. By sect. 1 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), a banking partnership may not consist of more than ten persons unless it is registered under that Act, or is formed in pursuance of some other Act or of letters patent, and cf. Sched. VI. Part 2 of that Act.

By sect. 2 of the Money Lenders Act, 1911 (1 & 2 Geo. 5, c. 38), a money-lender is prohibited from registering under any name including the word "bank," or implying that he carries on a banking business.

For a limited power to industrial societies to carry on banking business, see sect. 19 and Sched. III. of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), and note sect. 12 as to bills, notes and cheques.

Bankrupt.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

This definition includes a debtor whose estate is vested in a trustee under sect. 16 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), as well as a bankrupt properly so called. It does not appear to include a debtor against whom merely a receiving order has been made. See sects. 41 (d), 49 (10) and 51 (5), which require this definition. As to Scotland, see the Bankruptcy (Scotland) Act, 1913, sects. 5, 97 and 137.

Bearer.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

The possessor of a bill or note payable to order is not technically the "bearer" of it (*d*). As to the rights of a person who has given value for a bill payable to the order of some other person, see sect. 31 (4), *post*. By sect. 8 (3), a bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. See the definition of "holder," *post*, p. 5.

(d) Cf. *Day v. Longhurst* (1893), 62 L. J. Ch. 334.

“Bill” means bill of exchange, and “note” means promissory note. § 2.

Bill and note.

For the operative definition of these terms, see sects. 3 and 83; and see “cheque” defined by sect. 73, *post*.

“Delivery” means transfer of possession, actual or constructive, from one person to another. Delivery.

This definition is adopted by § 2 of the New York Negotiable Instruments Law of 1897. Sect. 62 of the Sale of Goods Act, 1893, defines delivery as “voluntary transfer of possession from one person to another” (*e*).

A person is said to have constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession in three cases, namely: (1) A bill is held by C. on his own account; he subsequently holds it as agent for D.; (2) A bill is held by C.’s agent, who subsequently attorns to D., and holds it as his agent; (3) A bill is held by D. as agent for C.; he subsequently holds it on his own account (*f*). As to the necessity for delivery to complete the contracts on a bill or note, see sect. 21, *post*, also sect. 84 as to notes. A delivery by mistake may be inoperative (*g*).

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (*h*). Holder.

See “holder for value” defined by sect. 27 (2) and (3), and “holder in due course” by sect. 29, *post*.

The term “holder” includes alike the payee, the

(*e*) 56 & 57 Viet. c. 71; and see *Pollock & Wright on Possession*, pp. 43, 46.

(*f*) See, *e.g.*, *Field v. Carr* (1828), 2 M. & P. 46; *Bosanquet v. Forster* (1841), 9 C. & P. 659; *Belcher v. Campbell* (1845), 8 Q. B. 1. Cf. also *Ancona v. Marks* (1862), 31 L. J. Ex. 163, ratification of delivery.

(*g*) *Ex parte Cote* (1873), 9 Ch. App. at p. 32.

(*h*) Cf. *Akrokerri Mines v. Economic Bank*, (1904) 2 K. B. at p. 472; *Walters v. Neary* (1904), 21 T. L. R. 140, C. A. (undorsed bill transferred for value).

§ 2.

indorsee, and the bearer of a bill. It signifies the mercantile owner of the instrument, who may or may not be the legal owner of it. Suppose C., the payee of a bill, indorses it in blank and transmits it to D. for some special purpose, *e.g.*, discount or collection. As long as D. retains possession, D., and not C., is the holder, and he alone can negotiate it (*i*).

In the cases the term holder is used in different senses. It is generally used to denote the lawful holder or holder in due course. It then includes (a) the person to whom a bill is by its terms payable, and whose title is good against all the world; (b) the person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though, as between himself and his transferor, he is a mere agent or bailee with a defeasible title, *e.g.*, an indorsee for collection. But "holder" is also used to denote an unlawful holder, that is, the person to whom a bill is by its terms payable, whose possession is unlawful (*e.g.*, the finder of a bill indorsed in blank), but who nevertheless can give a valid discharge to a person who pays it in good faith, and also a good title to a person who takes it before maturity in good faith and for value: see sect. 38, *post*. The above definition includes both classes of holders. An unlawful holder must be distinguished from a mere wrongful possessor, *e.g.*, a person holding under a forged indorsement, or a person who has stolen a bill payable to the order of another (*k*). Such person has no rights, and can give none: see sect. 24, *post*. It is to be noted that possession is an essential part of the definition (*l*).

The meaning of the expression "holder" in other statutes must be judged by the context, and is not governed by this definition (*m*).

Indorsement.

"Indorsement" means an indorsement completed by delivery.

See sect. 21, *post*, as to delivery; and sect. 32, *post*, as

(i) *Marston v. Allen* (1841), 8 M. & W. at p. 504.

(k) Cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at pp. 295, 296.

(l) Cf. *Emmett v. Tottenham* (1853), 8 Exch. 884; *Ancona v. Marks* (1862), 31 L. J. Ex. 163.

(m) *Nicholls v. Evans*, (1914) 1 K. B. 111, decided on 5 & 6 Will. 4, c. 42 (gaming).

§ 2.

to the requisites of a valid indorsement. "If, then," says Alderson, B., "a transfer by indorsement, as we have before shown, consists in an indorsement (or writing the name of the party transferring the bill on the bill), and a delivery for the purpose of completing such transfer, it will follow that the issue *did not indorse* involves both these propositions" (n). An indorsement valid as against the acceptor may be inoperative as between indorser and indorsee, as, for example, where a bill is indorsed for the purpose of the indorsee collecting it for the indorser, or on joint account (o).

The term "indorsee" is used to denote not only the person to whom a bill is specially indorsed, but also the bearer of a bill indorsed in blank, *i.e.*, any person who makes title to a bill through an indorsement (p).

The term "indorser" primarily denotes the holder of a bill who indorses it, but it is also used to denote any person who backs a bill with his signature, and thereby incurs the liability of an indorser: see sect. 56, *post*. Under the continental codes, such person would be spoken of as the giver of an "aval." As to "avals," see note to sect. 56, *post*. As to indorsement by way of receipt, and stamp exemption, see *post*, pp. 29 and 408.

"Issue" means the first delivery of a bill or Issue.
note, complete in form, to a person who takes it as a holder (q).

See sects. 9 (3), 12, and 72 (1), which require this definition. For stamp purposes a bill is not deemed to be issued till it has reached the hands of a holder for *value* (r). By sect. 31 a bill is "negotiated" when it is transferred from one person to another in such manner as to constitute the transferee the holder of the bill. As to incomplete instruments, see sect. 20, *post*.

(n) *Marston v. Allen* (1841), 8 M. & W. at p. 504; cf. *Lloyd v. Howard* (1850), 15 Q. B. 995, at p. 999.

(o) *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

(p) *Barber v. Richards* (1851), 6 Exch. at p. 65.

(q) Cf. *Clutton v. Attenborough*, (1897) A. C. at p. 93, H. L.

(r) *Downes v. Richardson* (1822), 5 B. & Ald. 674; *Scholfield v. Earl of Londesborough*, (1894) 2 Q. B. 660; see note to sect. 64 as to alterations, *post*, p. 247.

§ 2.	“ Person ” includes a body of persons, whether
Person.	incorporated or not.
Value.	“ Value ” means valuable consideration.
	For the operative definition, see sect. 27, <i>post</i> .
Written.	“ Written ” includes printed, and “ writing ” includes print.

This definition is inclusive. For a somewhat wider definition, see sect. 20 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63). As to “signature,” see sect. 91, *post*.

The definitions in this section are verbal; that is, they define the sense in which the particular terms are used in the Act. The substantial or operative definitions appear in their appropriate places in the Act itself.

These definitions, with the exception of the definition of “bankrupt,” are adopted by § 2 of the New York Negotiable Instruments Law of 1897, which, with or without some small modifications, is now enacted in forty-seven states or territories of the United States.

PART II.

BILLS OF EXCHANGE.

[By sect. 73, except as provided in Part III., the provisions of the Act applicable to a bill payable on demand apply to a cheque; and by sect. 89, with the exceptions and subject to the modifications there specified, the provisions of the Act relating to bills apply also to promissory notes.]

Form and Interpretation.

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer(s).

Bill of
exchange
defined.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

See "writing" defined, *ante*, p. 8.

A bill is sometimes called a draft, and an accepted bill is often referred to as "an acceptance." The person who gives the order is called the drawer. The person thereby ordered to pay is called the drawee, and if he signifies his assent to the order in due form (sect. 17) he is then called the acceptor. The person to whom the money is payable is called the payee or bearer, as the case may be.

(s) Cf. New York Negotiable Instruments Law, § 210, which, however, is confined to negotiable bills.

§ 3.

See "bearer" defined by sect. 2, *ante*, p. 4. The foreign codes for the most part provide in terms that a bill may be drawn by one person for the account of another, and bills so drawn are recognised by sect. 65 (1) and sect. 68 (1), *post*. The person for whose account the bill is drawn is spoken of in England as the "third account." For example, a merchant in America may direct his agent in England to draw on a correspondent in Paris for his (the principal's) account.

Comparing this definition with the wider definition of "bill of exchange" in sect. 32 of the Stamp Act, 1891, *post*, p. 397, it appears that instruments may require to be stamped as bills which do not possess the mercantile incidents of bills as defined by this Act. An instrument, invalid as a bill under the Act, may be valid as an agreement if it conform with the requirements of the general law as to agreements (*t*).

Form of
words or
language.

Under the Act, no special form of words is essential to the validity of a bill. Thus an order, sufficient in other respects, running "Credit C. or order in cash," instead of "Pay," is a valid bill (*u*). German Exchange Law, Art. 4, and Italian Code, Art. 251 (among others), require the instrument to state in terms that it is a bill of exchange, and the continental codes generally do not allow a bill originally to be drawn payable to bearer, though they do not prohibit the indorsement in blank of a bill drawn payable to drawer's order.

A bill may be drawn in any language (*x*). As to the amount receivable where the sum payable is expressed in a foreign currency, see sects. 9 and 72 (5).

Ambiguous
instrument.

Where an instrument is so ambiguously worded that it is doubtful whether it was intended for a bill or for a note, the holder may treat it at his option as either (*y*).

(*t*) See, e.g., *Brice v. Bannister* (1878), 3 Q. B. D. 569, C. A.; *Hamilton v. Spottiswoode* (1849), 4 Exch. 200.

(*u*) *Ellison v. Collingridge* (1850), 9 C. B. 570; cf. *Lovell v. Hill* (1838), 6 C. & P. 238; *Story*, § 33.

(*x*) See, e.g., *Re Marseilles Co.* (1885), 30 Ch. D. 598, where a bill in French was treated as an English instrument. In India bills drawn in the native language are called "Hundis," and native usages with respect to them are expressly saved by the Indian Act. See Chalmers and Caspersz' *Indian Negotiable Instruments Act*, 1881, ed. 3, p. 31.

(*y*) *Edis v. Bury* (1827), 6 B. & C. 433; *Lloyd v. Oliver* (1852), 18 Q. B. 471; *Fielder v. Marshall* (1861), 30 L. J. C. P. 158; cf. *Allen v. Mawson* (1814), 4 Camp. 115; New York Negotiable Instruments Law, § 36, and Indian Negotiable Instruments Act, s. 17.

The Act requires a bill to be signed by the drawer. The signature may be added at any time (see sects. 18 and 20); but until it is there the instrument is inchoate and without effect. Thus A. draws a bill on B., but does not sign it. B. accepts, and the instrument is transferred for value to C. The instrument is neither a bill nor a note (z): but if the instrument were in the drawer's hands so that he could add his signature at pleasure, it might be a security for the payment of money within sect. 75 of the Larceny Act, 1861 (24 & 25 Vict. c. 96) (a).

§ 3.

Signature of drawer.

It has been held in France that where a bill payable to drawer's order was indorsed by him, though he omitted to sign it on the face, this was sufficient: *Nouguier*, § 199.

A bill must be payable in "money"—that is, in legal tender. Therefore, an order requiring payment "in good East India bonds" (b) is not a bill of exchange. In a case in 1815 an order to pay "in cash or Bank of England notes" was held invalid (c); but now by the Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 5, the notes of that bank are made legal tender in England, except by the bank itself. Currency notes issued by the Treasury are legal tender throughout the United Kingdom, see the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14). As to Scottish and Irish bank notes, see sect. 4 of that Act. As to legal tender in coin, see the Coinage Act, 1870 (33 Vict. c. 10), ss. 4—6 (d). Again, an order requiring the drawee to pay a certain sum of money and deliver up a wharf to the payee (e), or requiring him to pay a certain sum and take up a note for the drawer, is not a bill (f). So, too, an order to deliver to bearer on demand

Money and money only.

(z) *M'Call v. Taylor* (1865), 34 L. J. C. P. 365; cf. *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94; 27 L. J. C. P. 286; *Ex parte Hayward* (1871), L. R. 6 Ch. 546.

(a) *R. v. Bowerman*, (1891) 1 Q. B. 112; and it may be evidence of a debt which the drawer's executors can enforce, *Lawson's Exors. v. Watson* (1907), 9 F. 1353 (Scotland). See now the Larceny Act, 1916, s. 46.

(b) *Buller*, N. P. p. 268.

(c) *Ex parte Imeson* (1815), 2 Rose. 225; cf. *Story*, § 43; New York Negotiable Instruments Law, § 20 (2) and § 25 (5), and cases cited in *Crawford's* edition.

(d) Bronze coins are legal tender to any amount not exceeding one shilling, silver coins to an amount not exceeding forty shillings, and gold coins to any amount.

(e) *Martin v. Chautrny* (1747), 2 Stra. 1271; cf. *Re Boyse* (1886), 33 Ch. D. at p. 621.

(f) *Cook v. Satterlee* (1826), 6 Cowan, New York R. 108; *Story*, § 43.

§ 3.

a certain quantity of iron is not a bill (*g*). But in the United States it seems that an instrument which gives the holder an *election* to require something to be done in lieu of payment of money may be valid as a negotiable instrument (*h*). As to the conversion into English money of bills expressed to be payable in a foreign currency, *e.g.*, dollars or rupees, see sect. 72 (4), *post*.

Bills and
notes under
20s.

By 48 Geo. 3, c. 88, negotiable bills or notes for less than 20s. were made void in England, and any person who issued or negotiated them was subject to a penalty not exceeding 20*l*. An exception was made in favour of cheques by 23 & 24 Vict. c. 111, s. 19. Both these Acts are repealed by Schedule II. to this Act. Consequently (except in the case of a note payable to bearer on demand) there is now no limit to the sum for which an English bill, note, or cheque may be drawn. By the Bank Notes (Scotland) Act, 1845 (8 & 9 Vict. c. 38), ss. 16 and 20, negotiable bills and notes for less than 20s. are made void in Scotland, and any person who issues or negotiates them is subject to a penalty not exceeding 20*l*., but an exception is made in favour of drafts on a banker for the payment of money "held to the use of" the drawer. This Act is not repealed.

As to promissory notes to bearer on demand, see note to sect. 83, *post*.

Order not
request.

A bill is an "order"; therefore it must in its terms be imperative and not precativè, but the insertion of mere terms of courtesy will not make it precativè. Thus, an instrument running, "Mr. B. will much oblige Mr. A. by paying to the order of C., &c.," was held good as a bill (*i*); but an instrument running, "Please let bearer have 100*l*. and you will much oblige me," was held not to be a bill (*k*).

Certainty
required.

It is of the essence of a bill that it should be payable at all events. Therefore its requisites must appear on its face with reasonable certainty. "The reason is (and

(*g*) *Dixon v. Bovill* (1856), 3 Macq. H. L. 1.

(*h*) New York Negotiable Instruments Law, § 24, and cases cited in *Crawford's* edition.

(*i*) *Ruff v. Webb* (1794), 1 Esp. 129; cf. *R. v. Ellor* (1784), 1 Leach, C. C. 323. The common form of a French bill runs "il vous plaira payer."

(*k*) *Little v. Slackford* (1828), 1 M. & M. 171; cf. *Hamilton v. Spottiswoode* (1849), 4 Exch. 200, where the document ran, "We authorize you to pay."

it is equally applicable to all negotiable instruments) that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit and negotiability, if paper securities of this kind were issued out into the world encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty. And hence the general rule is that a bill of exchange always implies a personal general credit not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of its negotiation" (*l*). Concerning the certainty required as to the drawee, see sect. 6; as to the payee, see sect. 7; as to the sum payable, see sect. 9.

§ 3.

A bill drawn payable in the common form, "as per advice," is not conditional (*m*); but a bill payable so many days after the arrival of a certain ship is conditional, and invalid, for the ship may never arrive (*n*); and the expression of an executory consideration on the face of a note may perhaps make it conditional (*o*). A demand draft on a bank payable on condition that a receipt form at the foot be duly signed is conditional (*p*). As to instruments payable on a contingency, see further, sect. 11 (2), *post*, and sects. 73 and 83, *post*. There is this distinction between a bill and a note. A bill may not be drawn conditionally, and a note may not be made conditionally; but a bill may be accepted conditionally: see sect. 19. Either a bill or note, unconditional in its origin, may be indorsed conditionally: see sect. 33. Again, a bill or note unconditional in form may, as between immediate parties, be delivered conditionally: see sect. 21 (2), *post*.

Conditional instruments.

(3) An order to pay out of a particular fund

Particular fund.

(*l*) *Story*, § 46; cf. *Carlos v. Fancourt* (1794), 5 T. R. at pp. 485, 487.

(*m*) *Story*, § 65. See effect of "advice" there considered.

(*n*) *Palmer v. Pratt* (1824), 2 Bing. 185. As to a note payable "as per agreement," see *Jury v. Barker* (1858), E. B. & E. 459.

(*o*) *Drury v. Macaulay* (1846), 16 M. & W. 146 (prom. note). But see sub-sect. 3, *post*.

(*p*) *Bovins v. London and S. W. Bank*, (1900) 1 Q. B. 270, C. A.; distinguished *Nathan v. Ogden's, Ltd.* (1905), 93 L. T. N. S. 553, and 94 L. T. N. S. 126, C. A., where the signing of the receipt was not made an express condition.

§ 3. is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional (q).

ILLUSTRATIONS.

The following are invalid, namely, orders or promises to pay (say) 100*l.*:—

1. out of the money in your hands belonging to the X. Company (r);
2. out of the money due from X. as soon as you receive it (s);
3. out of the money arising from my reversion when sold (t);
4. out of the moneys now due, or hereafter to become due, to me under the will of my late father, and before making any payment to me thereout (u).

The following are valid, namely, orders or promises to pay (say) 100*l.*:—

5. as my quarterly half-pay due 1st February by advance (x);
6. being a portion of a value as under, deposited in security for the payment hereof (y);
7. on account of moneys advanced by me for the X. Company (z);
8. against credit No. 20, and place it to account, as advised per X. and Co. (a);
9. which you will please charge to my account, and credit according to a registered letter I have addressed to you (b);
10. bill drawn against shipment of cotton running "and charge the same to account of 100 R. S. M. L. bales cotton" (c).

(q) Cf. New York Negotiable Instruments Law, § 22, and cases cited in *Crawford's* edition.

(r) *Jenney v. Herle* (1723), 2 *Ld. Raym.* 1361.

(s) *Dawkes v. Lord Deloraine* (1771), 3 *Wils.* 287; 2 *W. B.* 782.

(t) *Carlos v. Fancourt* (1794), 5 *T. R.* 482, *Ex. Ch.*; *Hill v. Halford* (1801), 2 *B. & P.* 413, *Ex. Ch.*

(u) *Fisher v. Calvert* (1879), 27 *W. R.* 301, *M. R.*

(x) *Macleod v. Snee* (1728), 2 *Stra.* 762.

(y) *Haussoullier v. Hartsinck* (1798), 7 *T. R.* 733.

(z) *Griffin v. Weatherby* (1868), *L. R.* 3 *Q. B.* 753.

(a) Cf. *Banner v. Johnston* (1871), *L. R.* 5 *H. L.* 157.

(b) *Re Boyse* (1886), 33 *Ch. D.* 612.

(c) *Guarantee Trust Co. of New York v. Hannay* (1918), 23 *Com. Cas.* 399, *C. A.*; (1918) 2 *K. B.* 623, *C. A.* (forged bill of lading).

An order invalid as a bill may of course be valid as an equitable assignment (*d*). See the English and American authorities up to 1874 reviewed in *Munger v. Shannon* (*e*). § 3.

(4) A bill is not invalid by reason—

(a) That it is not dated;

Date, place,
and value.

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

Though an undated bill may be valid, it is irregular to issue it undated. As to filling in the date in the case of an undated bill or acceptance, see sects. 12 and 20, *post*. The alteration of the date is a material alteration: sect. 64 (2). Under the continental codes it is essential that a bill should be dated. As to the effect of this conflict of laws, see sect. 72 (1). Date.

It is believed that all countries, except those where the Greek Church is the prevailing religion, use the new style, or Gregorian calendar. As to bills payable after date, drawn in a country where the old style prevails, see note to sect. 72 (5), *post*. Old and New
Style.

In England it is usual to insert in the bill either a statement of the value, or the words "value received," but this has long been held not to be essential (*f*), for the law raises a *primâ facie* presumption of consideration. In the case of an accepted bill payable to drawer's order, the words "value received" mean value received by the acceptor (*g*); while in a bill payable to a third party, they mean *primâ facie* value received by the drawer (*h*). Whether a bill expresses that value has been given or not, Statement
of value.

(*d*) *Buck v. Robson* (1878), 3 Q. B. D. 686; *Fisher v. Calvert* (1879), 27 W. R. 301; see, too, *Glyn v. Hood* (1860), 1 De G. F. & J. at p. 348, as to this distinction, and *passim*, *Percival v. Dunn* (1885), 29 Ch. D. 128.

(*e*) *Munger v. Shannon* (1874), 61 New York R. 251; and see the later cases in New York reviewed by Pickford, L.J., in *Guarantee Trust Co. of New York v. Hannay* (1918), 23 Com. Cas. 399, C. A.; (1918) 2 K. B. 642, C. A.

(*f*) *Hatch v. Trayes* (1840), 11 A. & E. 702.

(*g*) *Highmore v. Primrose* (1816), 5 M. & S. 65.

(*h*) *Grant v. Da Costa* (1815), 3 M. & S. 351.

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extrinsic evidence is admissible between immediate parties and those in privity with them to impeach the consideration, and show its absence, failure, or illegality (*i*). The contracts arising on a bill are contracts in writing. Subject, then, to the provisions of sect. 21 (2), parol evidence is not admissible to show that a bill was given in pursuance of an agreement inconsistent with its terms (*k*). Thus a note is expressed to be given "for commission for business transacted." In an action by payee against maker evidence is admissible to show that the payee never earned his commission (*l*); but parol evidence would not be admissible to vary the time of payment, or otherwise contradict the terms of the instrument as interpreted by the law merchant: see *post*, p. 64.

Under some of the foreign codes it is essential that the nature of the consideration should in general terms be stated in the bill (*m*). As to the effect of this conflict of laws, see sect. 72 (1).

Place of
making.

It is usual and convenient to state in a bill the place where it is drawn. By the Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), a penalty is imposed on the issue or negotiation in England of bills (other than cheques) or notes payable to bearer on demand for less than 5*l.*, which are made or purport to be made "in Scotland or Ireland or elsewhere out of England."

Place of
payment.

It seems that a bill may state an alternative place of payment (*n*). Where a bill is made payable elsewhere than at the residence or place of business of the drawee, the bill is said to be "domiciled" where payable. As to presentment for payment when no place of payment is

(*i*) *Abbott v. Hendricks* (1840), 1 M. & Gr. 791; cf. *Thompson v. Clubley* (1836), 1 M. & W. 212; *Abrey v. Crux* (1869), L. R. 5 C. P. 37.

(*k*) *Ridout v. Bristow* (1830), 1 Cr. & J. 231; *Foster v. Jolly* (1835), 1 C. M. & R. 703; *Young v. Austen* (1869), L. R. 4 C. P. 553; *Hill v. Wilson* (1873), 42 L. J. Ch. 817; L. R. 8 Ch. App. 888.

(*l*) *Abbott v. Hendricks* (1840), 1 M. & Gr. 791, see at p. 796.

(*m*) French Code de Commerce, Art. 110; Netherlands Code, Art. 100; as to false statement of value and its effects (*supposition de valeur*), see *Nouguier*, §§ 282, 283.

(*n*) *Beeching v. Gower* (1816), Holt, N. P. C. 313; cf. *Pollard v. Herries* (1803), 3 B. & P. 335; note payable in London or Paris at holder's option. For an example of a Mexican Treasury note payable at holder's option in London or New York, see *Speyer Bros. v. Inland Revenue*, (1907) 1 K. B. 246, 247, C. A.

specified, and the address of the drawee is not given, see sect. 45 (4), *post*. By French Code, Art. 110; Italian Code, Art. 251; and German Exchange Law, Art. 4, the place of payment must be stated.

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4. (1) An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

Inland and foreign bills.

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

ILLUSTRATIONS.

1. A bill is drawn in Liverpool on a merchant in London. It is accepted payable in London, but is indorsed in Paris. This is an inland bill (*o*).

2. A bill is drawn in Liverpool on B., who resides in London. B. accepts it payable in Paris. This is an inland bill.

3. A bill is drawn in London upon a merchant in Brussels, payable in London, and is accepted. This is an inland bill (*p*).

The distinction between an inland and a foreign bill is this. A foreign bill if dishonoured must be protested, but an inland bill need not be protested: see sect. 51, *post*. But if any party to a bill is resident abroad, it should, as a matter of prudence, be protested for the purpose of recourse against him in his own country. By sect. 45 (4), where no place of payment is specified in a bill, it is pay-

(*o*) See sect. 72 (2); and cf. *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77.

(*p*) Cf. *Amner v. Clark* (1835), 2 C. M. & R. 468; and sect. 72 (3). If the bill were not drawn payable in London, it would in its origin be a foreign bill, and would, presumably, continue so, though subsequently accepted payable in London.

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able at the address of the drawee. As to the measure of damages when a bill is dishonoured abroad, see sect. 57 (2), *post*; and as to conflict of laws, see sect. 72, *post*.

Sub-sect. (1) reproduces the effect of the repealed 19 & 20 Vict. c. 97, s. 7, with the addition of the words, "or on the face of it purports to be." Sub-sect. (2) is new. The result appears to be that though a bill purports to be a foreign bill, the holder may nevertheless show that it is in fact an inland bill for the purpose of excusing protest; while if it purports to be an inland bill, though really a foreign bill, he may treat it, at his option, as either.

This section does not affect the provisions of the Stamp Act, 1891, which are saved by sect. 97 (3). For stamp purposes any bill drawn or made out of the United Kingdom, *e.g.*, a bill drawn in the Isle of Man—is a foreign bill: see *post*, pp. 399, 400. As to a foreign note, see sect. 89 (4), *post*.

Effect where
different
parties to bill
are the same
person.

5. (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee(*q*).

ILLUSTRATION.

A bill in the form "pay to — order" is signed by the drawer and indorsed by him. This is a bill payable to drawer's order, as if it ran "pay to my order" (*r*).

A bill is sometimes drawn in the form "Pay to your own order," when the drawee acts in two different capacities, *e.g.*, if he be in business on his own account, and also agent for some other person interested in the bill (*s*). In such case, it is clear that the instrument is not a bill which can be enforced until the drawee has indorsed it away (*t*). So, too, when a customer wishes to get cash from his bankers over the counter, he sometimes draws a cheque in the form "Pay yourselves."

(*q*) New York Negotiable Instruments Law, § 27.

(*r*) *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A. *Sed qu.*, per Bowen, L.J., if the instrument had run, "Pay to — or order."

(*s*) See *Holdsworth v. Hunter* (1830), 10 B. & C. 449; *Witte v. Williams* (1876), 28 Amer. R. 294; *Pardessus*, § 339.

(*t*) Cf. *R. v. Bartlett* (1841), 2 M. & R. 362.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note (*u*). § 5.

Drawer and drawee same person or firm.

ILLUSTRATIONS.

1. A firm carries on business in London and Liverpool. The London house draw a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool; and if it be not paid the omission to give notice of dishonour to the London house is immaterial (*x*).

2. A. draws a bill on B. and negotiates it away; B. is a fictitious person. The holder may treat the bill as a note made by A. He need not prove presentment or give notice of dishonour (*y*).

3. The directors of a joint stock company draw a bill in the name of the company, addressed "To the Cashier." The holder may treat it as a note by the company (*z*).

By sect. 2, *ante*, "person" includes a body of persons, whether incorporated or not. For purposes of proof in bankruptcy, where drawer and drawee are the same person or firm, the instrument can only be treated as a note; that is to say, there cannot be two proofs against the same estate, because of the form of the instrument (*a*). As to fictitious payee, see sect. 7 (3), *post*. As to persons "not having capacity to contract," see sect. 22, *post*. As to fictitious drawer, see sect. 55 (2), *post*. By sect. 41 (2), presentment for acceptance is excused where the drawee is a fictitious person or a person not having capacity to contract by bill. By sect. 46 (2), presentment for payment is excused where the drawee is a fictitious person. By sect. 50 (2), notice of dishonour is dispensed with as

(*u*) New York Negotiable Instruments Law, § 214.

(*x*) *Miller v. Thompson* (1841), 3 M. & Gr. 576; *Fairchild v. Ogdensburgh Railway Co.* (1857), 15 N. Y. 337; *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, at p. 250, H. L.; cf. German Exchange Law, Art. 6; *Willans v. Ayers* (1877), 3 App. Cas. 133, P. C.; *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at p. 325.

(*y*) *Smith v. Bellamy* (1817), 2 Stark. 223.

(*z*) *Allen v. Sea, Fire, and Life Assurance Co.* (1850), 9 C. B. 574.

(*a*) *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, H. L.; see sect. 97 (1), *post*, saving bankruptcy laws.

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regards the drawer where drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract; and as regards an indorser where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill. If both drawer and drawee are fictitious persons the bill might, perhaps, be treated as a note made by the first indorser.

Address to
drawee.

6. (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty (*b*).

ILLUSTRATIONS.

1. Instrument in the form of a bill, but addressed to no one. B. writes an acceptance thereon. This is not a bill, and B. is not liable as an acceptor (*c*); but he may be liable as the maker of a note (*d*).

2. Instrument in the form of a bill payable to drawer's order, not containing the name of a drawee, but expressed to be payable "at No. 1, Union Street, London." B., who lives there, accepts it. This is a bill, and B. is liable as acceptor (*e*).

3. Instrument in the form of a bill. Where the address to the drawee should be are the words "at Messrs. B. & Co." This is a bill addressed to B. & Co. (*f*).

As to a fictitious drawee, see sect. 5 (2). The question raised in Illustration 2 has arisen also in Scotland and in France, and has been decided in the same way (*g*). Speaking of the indication of the drawee, Mr. Justice Story says: "This seems indispensable to the rights, duties, and obligations of all the parties, for the payee cannot otherwise know upon whom he is to call to accept and pay the bill; nor can any other person know whether it is addressed to him or not, and whether he would be justified in accepting and paying the bill on account of the drawer" (*h*). As to filling up material blanks, see sect. 20, *post*.

(*b*) Cf. *Peto v. Reynolds* (1854), 9 Exch. 410, and 11 Exch. 418, Ex. Ch.; New York Negotiable Instruments Law, § 20 (5).

(*c*) *Peto v. Reynolds*, *supra*; cf. *Edis v. Bury* (1827), 6 B. & C. 433.

(*d*) *Fielder v. Marshall* (1861), 30 L. J. C. P. 158.

(*e*) *Gray v. Milner* (1819), 8 Taunt. 739.

(*f*) *Shuttleworth v. Stephens* (1808), 1 Camp. 407.

(*g*) *Thompson*, 2nd ed. p. 46; *Nouguier*, § 131.

(*h*) *Story on Bills*, § 58.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange (*i*).

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Several drawees.

By sect. 19 (2), *post*, the acceptance of some one or more of several drawees, but not of all, is a qualified acceptance. Though a bill may not be addressed to two drawees in succession, or in the alternative, it may name a drawee in case of need: see sect. 15; but his status is wholly different from that of an ordinary drawee. Alternative or successive drawees would give rise to difficulty as to the recourse if the bill was dishonoured. This difficulty does not arise in the case of a note; consequently the makers of a note may be liable jointly, or jointly and severally, according to its tenour (sect. 85), while the acceptors of a bill can only be liable jointly. A note payable in the alternative by one of two makers is invalid (*k*). Under the continental codes there may be an "aval" on a bill for the acceptor; see note to sect. 56, *post*.

7. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty (*l*).

Certainty required as to payee.

Cheques are commonly drawn payable to bearer, bills but rarely so.

"A bill of exchange," says Mr. Justice Story, "ought to specify to whom the same is payable, for in no other way can the drawee, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability": *Story*, § 54.

The continental codes prohibit bills drawn payable to bearer, but admit the indorsement in blank of bills payable to drawer's order.

Extrinsic evidence is admissible to identify the payee

Evidence of identification.

(i) Cf. *Jackson v. Hudson* (1810), 2 Camp. at p. 448, "There cannot be a series of acceptors": New York Negotiable Instruments Law, § 212.

(k) *Ferris v. Bond* (1821), 4 B. & Ald. 679.

(l) Cf. New York Negotiable Instruments Law, § 27 (6).

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when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill (*m*). Thus, if a bill is payable "to the order of the Treasurer of Portugal," evidence is admissible to show that C. was the treasurer when the bill was issued (*n*); and if a bill is payable "to the order of J. Smythe," evidence is admissible to show that T. Smith is the person intended to be described thereby (*o*). But if a bill be drawn in the form, "Pay ——— or order," evidence is not admissible to show that C. was intended to be the payee (*p*). A bill payable "to ——— order," and indorsed by the drawer, is payable to drawer's order (*q*). As to filling up the blank by inserting a payee's name, see sect. 20, *post*. In a Scotch case, an instrument running, "Received from C. the sum of 30*l*. payable on demand," and signed, was held to be a note payable to C. (*r*); and in a New York case a note payable "to the order of the indorser" was held good as being payable to any holder who might indorse it (*s*). By sect. 32 (4), *post*, where the payee is wrongly designated or his name is misspelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

Alternative
payee or office
holder.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being (*t*).

This sub-section materially alters the previous law. Before its enactment a bill drawn payable to the "treasurer

(*m*) *Soares v. Glyn* (1845), 8 Q. B. 24, Ex. Ch.

(*n*) *Ibid.*; cf. *Holmes v. Jacques* (1866), L. R. 1 Q. B. 376.

(*o*) *Willis v. Barrett* (1816), 2 Stark. 29; *Jacobs v. Benson* (1855), 39 Maine, R. 132.

(*p*) *R. v. Randall* (1811), R. & R. 195. But Exchequer bills in this form are deemed to be payable to bearer: *Wookey v. Polc* (1820), 4 B. & Ald. 1. Treasury bills and Council of India bills, too, are issued in this form. See form of Treasury bill, *post*, p. 382.

(*q*) *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A.; and cf. *Dann v. Sherwood* (1895), 11 Times L. R. 211.

(*r*) *Thorburn on Bills*, p. 35; *M'Gubbin v. Stephen* (1856), 18 D. 1824.

(*s*) *United States v. White* (1841), 2 Hill, R. 59.

(*t*) New York Negotiable Instruments Law, § 27, and cases cited in *Crawford's* edition.

for the time being" of a society was void for uncertainty (*u*); so, too, was a bill drawn payable "to the order of T. Smith or S. Jones," unless there was apparent community of interest (*x*). § 7.

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. Fictitious payee.

ILLUSTRATIONS.

1. A. draws a bill payable to C.'s order. C. is a fictitious person. The drawee accepts in ignorance of this fact. A. then indorses the bill in blank in C.'s name, and discounts it with D., who knows the circumstances. D., before the Act, could not recover from the acceptor (*y*); but since the Act it seems he could.

2. A bill purporting to be drawn by A. and indorsed in blank by C., the payee, is accepted *supra* protest for the honour of the drawer. It turns out that A.'s signature was forged, and that C. was a fictitious person. The acceptor for honour is estopped from setting up these facts if the bill is in the hands of a holder in due course (*z*).

3. By arrangement between the indorsee and acceptor a bill is drawn and indorsed in the name of a deceased person. The indorsee can recover from the acceptor (*a*).

4. A bill purporting to be drawn by A. to the order of C. & Co., and to be indorsed by them, is accepted by the drawee payable at his bankers'. The bankers pay it at maturity. A. is a correspondent of the acceptor's, who often draws bills in favour of C. & Co. It turns out afterwards that the names and signatures of the drawer and payees were forged by a clerk of the acceptor's, who obtained the money. In these circumstances C. & Co. are

(*u*) *Cowie v. Sterling* (1856), 6 E. & B. 333, Ex. Ch.; *Yates v. Nash* (1860), 29 L. J. C. P. 306.

(*x*) *Blanckenhagen v. Blundell* (1819), 2 B. & Ald. 417; cf. *Holmes v. Jacques* (1866), L. R. 1 Q. B. 376; and *Watson v. Evans* (1863), 32 L. J. Ex. 137, where the instruments were upheld.

(*y*) *Hunter v. Jeffery* (1797), Peake, Ad. Cas. 146; *aliter*, if the acceptor knew the facts: *Gibson v. Minet* (1791), 1 H. Bl. 569, H. L.; *Gibson v. Hunter* (1794), 2 H. Bl. 288; cf. *Vagliano v. Bank of England* (1889), 23 Q. B. D. at p. 258, where the cases are reviewed.

(*z*) *Phillips v. im Thurn* (1865), 18 C. B. N. S. 694, on demurrer; see same case, L. R. 1 C. P. 463, on evidence.

(*a*) *Ashpitel v. Bryan* (1863), 32 L. J. Q. B. 91; affirmed by Ex. Ch. 33 L. J. Q. B. 328; cf. *Vagliano v. Bank of England* (1889), 23 Q. B. D. at p. 260, C. A.

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fictitious payees, and the bankers can debit the acceptor's account with the sum so paid (b).

5. A clerk in the account branch, by false pretences, induces the plaintiff, his employer, to draw cheques in favour of B., a fictitious person, who he alleges has done work for the firm. He then forges an indorsement in B.'s name, and negotiates the cheques to the defendant for value. The bankers pay the defendant. The plaintiff cannot recover the money so paid from the defendant (c).

6. A clerk to a firm of market salesmen draws up, according to custom, a series of cheques payable to customers of the firm, and gets one of the partners to sign them. Instead of posting the cheques to the payees, he forges their signatures, and cashes them from time to time with a tradesman with whom he deals. The cheques are collected by the tradesman's bank. The drawers of the cheques can recover the amount thereof from the tradesman, for the payees were not fictitious (d).

7. A. is induced by X. to draw a cheque in favour of C., whom X. fraudulently represents as having certain shares which A. wishes to acquire. C. has no such shares, and X., instead of forwarding the cheque to him, forges his name and pays the cheque in to his own bankers, who receive the amount. A., the drawer, can recover the amount from the bankers, for C. is not a fictitious payee (e).

This sub-section was inserted in committee in place of a clause working out in detail the effect of the cases. The words "or non-existing" seem superfluous; but they were intended to cover the case given in Illustration 3. The New York Negotiable Instruments Law, § 28, provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable*; or when the name of the payee does not purport to be the name of any person," *e.g.*, when a cheque is drawn in the form "Pay Cash" or "Pay Sundries."

(b) *Bank of England v. Vagliano*, (1891) A. C. 107, H. L., reversing *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243, C. A. See this case discussed by the author, *Law Quarterly Review*, vol. 7, p. 216, and by Mr. Butterworth, vol. 10, p. 40; *Paget on Banking*, ed. 2, pp. 48—53.

(c) *Clutton v. Attenborough*, (1895) 2 Q. B. 707, C. A.; affirmed *ibid.*, (1897) A. C. 90, H. L.

(d) *Vinden v. Hughes*, (1905) 1 K. B. 795; followed in an Irish case, *Town Advance Co. v. Provincial Bank of Ireland* (1917), 2 Ir. R. 421.

(e) *North and South Wales Bank v. Macbeth*, (1908) A. C. 137, H. L., affirming *Macbeth v. N. and S. Wales Bank*, (1908) 1 K. B. 13, C. A.

§ 7.

Before the Act it appears that even a holder in due course could not enforce a bill which he held under the indorsement of a fictitious person, except as against parties who were privy to the fiction; "the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee" (f).

But the Act has swept away the former qualifications, and now any holder who could recover if the bill had been drawn payable to bearer can recover if the payee be fictitious. When a bill is payable to the order of a fictitious person it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books the Act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person, but in the hands of another, is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bonâ fide* holder would be justified in indorsing it in the payee's name. It might have been better if the Act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not affect the rights of a person who has received or paid it in good faith.

Vagliano's Case, cited in Illustration 4, gave rise to a great conflict of judicial opinion as to whether C. & Co. were fictitious payees. The Courts below held that, inasmuch as there was a real firm of C. & Co., the payees were not fictitious; but according to the judgment of the majority of the Lords, C. & Co. were fictitious payees, and for this reason—the bill was a forgery throughout, and the real C. & Co. never were, and never were intended to be, the payees. If by any means they had obtained the bill they would not have been entitled to it, and their

(f) *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243, at p. 260, per Bowen, L.J., reviewing the cases; *Story on Bills*, §§ 56, 200.

§ 7. indorsement could have conveyed no title against the supposed drawer whose name was forged. It was as if the forger had inserted the first name he came across in a directory (*g*).

The signature of a fictitious person must be distinguished from (a) the forged signature of a real person, and (b) the signature of a real person using a fictitious name—for instance, John Smith may trade as “The Birmingham Hardware Company,” and sign accordingly (*h*). But if a person, with intent to defraud, signs a bill in a fictitious name he may be guilty of forgery; see sect. 1 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

By sect. 34 (3), *post*, the provisions of the Act relating to a payee apply, with the necessary modifications, to an indorsee under a special indorsement. As to the estoppels which bind an acceptor as such, see sect. 54 (2), *post*; and as to the estoppels which bind a drawer or indorser as such, see sect. 55, *post*. As to estoppel by negligence, see note to sect. 24, *post*.

Before the Act, it was held that where a bill was drawn payable to a deceased person in ignorance of his death, his personal representatives might enforce the bill, and there is nothing in the Act to derogate from this ruling (*i*).

In France the insertion of a fictitious payee constitutes a “supposition de nom,” which avoids the bill in the hands of any party with notice thereof (*k*). Under most of the continental codes it is expressly provided that the payor (acceptor or his banker) is not bound to verify the genuineness of the indorsements (*l*), on the ground that he has no means of doing so.

8. (1) When a bill contains words prohibiting transfer, or indicating an intention that it should

What bills are negotiable.

(*g*) *Bank of England v. Vagliano*, (1891) A. C. 107, H. L., judgment of Lord Herschell; and see judgment of Lord Esher in Court below, 23 Q. B. D. at p. 247, and *Law Quarterly Review*, vol. 7, p. 216, vol. 10, p. 40.

(*h*) See, too, *Schultz v. Astley* (1836), 2 Bing. N. C. 544, where Thomas Wilson Richardson drew a bill as Thomas Wilson.

(*i*) *Murray v. East India Co.* (1821), 5 B. & Ald. 204.

(*k*) *Nouguier*, §§ 277, 284—288.

(*l*) See Italian Code, Art. 287; German Exchange Law, Art. 36.

not be transferable, it is valid as between the parties thereto, but is not negotiable. § 8.

ILLUSTRATIONS.

1. A note is drawn in the form, "I promise to pay C. only." It is not negotiable.

2. A. draws a cheque, making it payable to C. or order, and crosses it "Account of C., National Bank, Dublin." C. indorses it and sends it to his bankers (the National Bank), who credit him with the amount. The bankers can maintain an action against A., the drawer, if the cheque is stopped (*m*).

3. The acceptor of a bill payable to drawer or order when accepting it writes over his acceptance the words "in favour of A. (the drawer) only," and the words "or order" are struck out. This may be construed as a mere memorandum, and the negotiability of the bill is not restricted (*n*).

This sub-section must be read with sub-sect. (4). The foreign codes do not recognize bills which are not negotiable in their origin. As to when a bill negotiable in its origin ceases to be negotiable, see sects. 35 and 36, *post*.

As to the expression "not negotiable" as part of the crossing of a cheque, which has a special statutory meaning, see sect. 81, *post*.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. Bearer.

See "bearer" defined by sect. 2, *ante*, p. 4. This sub-section alters the law. It was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank. Before the Act it was held that where a

(*m*) *National Bank v. Silke*, (1891) 1 Q. B. 435, C. A. See note, *post*, p. 305, as to "a/c payee." The judgments go beyond what was necessary for the decision of the case, namely, that when the cheque had been duly credited to the payee's account the banker has the ordinary rights of a banker who has credited his customer's account with the amount of a cheque.

(*n*) *Decroix v. Meyer*, (1891) A. C. 520, H. L.; *aliter*, it seems, if the acceptance had run "accepted in favour of C. only."

§ 8. bill was indorsed in blank, its negotiability to bearer was not affected by a subsequent special indorsement (*o*), though the special indorser was only liable on his indorsement to such parties as made title through it (*p*).

See sect. 34, *post*, as to blank indorsements, and converting blank indorsements into special indorsements.

A bill payable "to J. C. or bearer" is payable to bearer, but a bill payable "to bearer (J. C.) or order" is presumably payable to order. A bill payable "to J. C. and others or bearer," if marked "account payee," is not payable to bearer (*q*).

Order.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

ILLUSTRATION.

A bill is drawn in the form "pay C. one hundred pounds." This, in legal effect, is a bill payable to C. or order.

This sub-section alters the law. Before the Act it was held in England that a bill or note drawn payable to a specified person without the addition of words authorizing transfer, *e.g.*, "Pay C.," was not negotiable (*r*). In Scotland it was held that a bill or note was negotiable unless it contained words prohibiting transfer, as, for instance, "Pay C. only." The Act has adopted the Scottish rule.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order

(*o*) *Walker v. Macdonald* (1848), 2 Exch. 527.

(*p*) *Smith v. Clarke* (1794), Peake, 225; *Story*, § 207. The New York Negotiable Instruments Law, § 70, re-enacts the common law rule.

(*q*) *House Property Co. v. London County and Westminster Bank* (1915), 84 L. J. K. B. 1846.

(*r*) *Plimley v. Westley* (1835), 2 Bing. N. C. at p. 251; *Whyte v. Heylman* (1859), 34 Pennsylvania R. 143; *aliter*, as to an indorsement, *Edie v. East India Co.* (1761), 2 Burr. 1216; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 357.

of a specified person, and not to him or his order, § 8.
it is nevertheless payable to him or his order at
his option.

This sub-section is declaratory (*s*). It provides that a bill payable "to the order of C." is in legal effect payable "to C. or order," *i.e.*, that C. can demand payment without giving a responsible indorsement. C. of course is bound to give a receipt to the same extent as any other person who receives payment of money. See an indorsement by way of receipt distinguished by Byles, J., from an ordinary indorsement which is in the nature of a guarantee (*t*).

9. (1) The sum payable by a bill is a sum Sum payable.
certain within the meaning of this Act, although
it is required to be paid—

- (a) With interest.
- (b) By stated instalments.
- (c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due (*u*).
- (d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

ILLUSTRATIONS.

1. Bill for 100*l.* payable "with lawful interest." Valid (*x*).
2. Bill for 100*l.* payable by two equal instalments due 1st January and 1st July. Valid (*y*).

(*s*) *Smith v. McClure* (1804), 5 East, 476; cf. *Harvey v. Cane* (1876), 34 L. T. N. S. 64.

(*t*) *Keane v. Beard* (1860), 8 C. B. N. S. at p. 382; cf. *Paget on Banking*, ed. 2, p. 46. As to stamp exemption, see *post*, p. 408.

(*u*) *Carlton v. Kenealy* (1843), 12 M. & W. 139; cf. New York Negotiable Instruments Law, § 21.

(*x*) Cf. *Warrington v. Early* (1853), 2 E. & B. 763; 23 L. J. Q. B. 47; but see a Scotch case (*Lamberton v. Aiken* (1899), 1 Ct. of Sess. Cas. 189), where a note for 250*l.*, "together with any interest that may accrue thereon," was held invalid, *sed qu.*?

(*y*) *Carlton v. Kenealy* (1843), 12 M. & W. 139; *Gaskin v. Davis*

§ 9.

3. Bill for 100*l.* payable "by instalments," not specifying dates or amounts. Invalid (*z*).

4. Bill for 100*l.* payable "by ten equal instalments, payable, &c., all instalments to cease on the death of X." Invalid (*a*).

5. Bill for 100*l.*, or bill for 1,000 francs, payable "at exchange as per last indorsement." Valid.

6. Bill for 100*l.* "payable in Paris or London, at the choice of the holder, according to the course of exchange upon Paris." Valid (*b*).

By sect. 3, a bill must be drawn for "a sum certain" in money. When the rate of interest is not expressed, five per cent. is understood (*c*). Since the abolition of the Usury Laws there is no limit in England as to the rate of interest the parties may agree upon. In many American states and continental countries usury laws are still in force. Interest proper, that is to say interest reserved by the instrument, must be distinguished from interest by way of damages, as to which see sect. 57 (3), *post*. As to money lenders and unconscionable bargains, see *post*, p. 96.

The indorsement of a rate of exchange without authority is a material alteration which may avoid a bill (*d*). See a statement of the practice as to the sale of foreign bills, and the mode of fixing the exchange in *Suse v. Pompe* (*e*).

In the absence of indication given by the bill, when a bill is drawn in one country and payable in another, and the sum payable is expressed in the currency of the former, the amount the holder is to receive must be calculated according to the rate of exchange on the day that the bill is payable (*f*). For fiscal purposes a different rule necessarily prevails (see sect. 6 of the Stamp Act, 1891, *post*, p. 403), which makes the date of the instrument the critical date for determining the amount of the stamp.

(1860), 2 F. & F. 294. Days of grace must be added to the instalment due-dates: *Oridge v. Sherborne* (1843), 11 M. & W. 374.

(*z*) *Moffatt v. Edwards* (1841), Car. & M. 16.

(*a*) *Worley v. Harrison* (1835), 3 A. & E. 669.

(*b*) Cf. *Pollard v. Herries* (1803), 3 B. & P. 335, prom. note.

(*c*) Cf. *Re Commercial Bank* (1887), 36 Ch. D. at p. 529.

(*d*) *Hirschfield v. Smith* (1866), L. R. 1 C. P. 340. See sect. 64 as to alterations.

(*e*) *Suse v. Pompe* (1860), 8 C. B. N. S. at p. 542; 30 L. J. (C. P. 75).

(*f*) See sect. 72 (4), *post*; and *Hirschfield v. Smith* (1866), L. R. 1 C. P. at p. 353; Belgian Code, Art. 33.

In the old case of *Da Costa v. Cole* (*g*), a bill was drawn in England on Portugal, and expressed to be payable in "rees," that is, in Portuguese currency. Between the time of issue and payment the Portuguese currency was depreciated. It was held that the holder was entitled to be paid according to the former value. This decision seems inconsistent with sect. 72 (4), *post*, as to bills expressed to be payable in foreign currency (*h*).

§ 9.

The following instruments would be invalid as bills or notes, as not being for sums certain within the meaning of sect. 3, namely:—An order to pay C. "100*l*. and all other sums which may be due to him" (*i*); or an order to pay C. "the proceeds of a shipment of goods value 2,000*l*., consigned by me to you" (*k*); or an order to pay C. "the balance due to me for building the Baptist College Chapel" (*l*); or a promise to pay C. "100*l*. and the demands of the Sick Club" (*m*); or "100*l*. and all fines according to rule" (*n*).

Uncertain sum.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable (*o*).

Discrepancy in words and figures.

ILLUSTRATIONS.

1. A bill is drawn, "Pay to the order of C. two hundred pounds." In the margin is superscribed 250*l*. This is a bill for 200*l*. only (*p*).

2. Bill on sufficient stamp for "one hundred pounds," with 10*l*. in the margin. The sum payable is 100*l*. (*q*).

(*g*) *Da Costa v. Cole* (1688), Skinner, 272, holder *v.* drawer.

(*h*) And cf. *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525 (postponement of payment by *ex post facto* legislation).

(*i*) *Smith v. Nightingale* (1818), 2 Stark. 375.

(*k*) *Jones v. Simpson* (1823), 2 B. & C. 318.

(*l*) *Crowfoot v. Gurney* (1832), 9 Bing. 372.

(*m*) *Bolton v. Dugdale* (1833), 4 B. & Ad. 619.

(*n*) *Ayrey v. Fearnside* (1838), 4 M. & W. 168.

(*o*) Cf. New York Negotiable Instruments Law, § 36 (1), and cases cited in *Crawford's* edition.

(*p*) *Saunderson v. Piper* (1839), 5 Bing. N. C. 425; German Exchange Law, Art. 5.

(*q*) Cf. *Garrard v. Lewis* (1882), 10 Q. B. D. 30, at pp. 34, 35; and as to history of marginal figures, see per Bowen, L.J., at p. 32:

§ 9.

3. A bill is drawn, "Pay to the order of C. one hundred." In the margin is inserted 100*l*. This is a bill for 100*l*. (*r*).

4. Bill in the form, "Pay to my order, twenty-five, ten shillings." This is sufficient as a bill for 25*l*. 10*s*. (*s*).

5. A partner in a firm draws a cheque to bearer, not filling in the amount in the space for words, but putting 2*l*. in the space for figures. A confidential clerk misappropriates the cheque, writes "one hundred and twenty pounds" in the space for words, and alters the "2" into "120." If the bank pays this cheque to the clerk it can debit the firm's account with 120*l*. (*t*).

German Exchange Law, Art. 5, and some other continental codes, provide, that if the amount be expressed both times in figures or both times in words, and there is a discrepancy, the smaller sum is the amount payable. If a bill ran simply, "Pay to my order £——," evidence would be inadmissible to show the sum for which it was intended to be drawn (*u*); but an instrument in this form would be a *prima facie* authority to the holder to fill in any sum the stamp would cover, see sect. 20, *post*.

Calculation of
interest.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof (*x*).

ILLUSTRATIONS.

1. Bill for 200*l*., payable six months after date with interest. The sum payable at maturity is 205*l*. (*y*).

2. B. makes a note expressed to be payable with interest one year after his death. Interest runs from the date of the note (*z*).

and cf. *Heeney v. Addy* (1910), 2 Ir. R. 688 (marginal figures only); *Story*, § 42.

(*r*) *R. v. Elliot* (1777), 1 Leach, C. C. 175.

(*s*) *Phipps v. Tanner* (1833), 5 C. & P. 488.

(*t*) *London Joint Stock Bank v. Macmillan*, (1918) A. C. 777, H. L., reversing the Courts below.

(*u*) *Norwich Bank v. Hyle* (1839), 13 Connecticut, 379; cf. *Saunders v. Piper* (1839), 5 Bing. N. C. at p. 431.

(*x*) Cf. New York Negotiable Instruments Law, § 36 (2).

(*y*) *Domon v. Dibdin* (1826), R. & M. 381.

(*z*) *Roffey v. Greenwell* (1839), 10 A. & E. 222; cf. *Richards v. Richards* (1831), 2 B. & Ad. 447, before the Married Women's Property Act.

See "issue" defined by sect. 2, *ante*, p. 7. Interest proper, payable by the instrument itself, must be distinguished from interest by way of damages payable on its dishonour (*a*). As to the latter, see sect. 57, *post*. The interest reserved does not affect the stamp (*b*).

§ 9.

Bill payable
on demand.

10. (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand (*c*).

Sub-sect. (1) (*a*) reproduces the effect of the repealed 34 & 35 Vict. c. 74. Before that enactment it was doubtful whether or no days of grace attached to bills expressed to be payable "at sight" or "on presentation." By virtue of sect. 14, *post*, days of grace do not attach to bills payable on demand.

A post-dated cheque may be stamped as a bill payable on demand (*d*); and when the time arrives, it is, of course, payable without grace; but for many purposes it is equivalent to a bill payable after date (*e*). By sect. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), *post*, p. 408, bills of exchange expressed to be payable at a period not exceeding three days after date or sight may be stamped as bills payable on demand. For stamp purposes certain documents, which would not be bills within the meaning of this Act, require to be stamped as "bills payable on demand." See sect. 32 of the Stamp Act, 1891, *post*, p. 397.

(a) Cf. *Ex p. Charman, Re Claggett* (1887), W. N. p. 184, C. A.

(b) *Pruessing v. Ing* (1821), 4 B. & Ald. 204.

(c) New York Negotiable Instruments Law, § 26, and cases cited in *Crawford's* edition.

(d) *Gatty v. Fry* (1877), 2 Ex. D. 265; *Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.; *Paget on Banking*, ed. 2, p. 43.

(e) See note to sect. 13 (2); and *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

§ 10. As regards instruments payable on demand, see sect. 36 (3), when overdue; sect. 45 (2), presentment for payment; sect. 60, forged indorsement; sect. 73, cheque; and sect. 86, as to notes.

Before the enactment of sub-sect. (2) the English law on the subject dealt with was very obscure; but the sub-section followed cases decided in the United States. As to the rights of the transferee of an overdue bill against parties liable thereon before its maturity, see sect. 36, *post*. Under German Exchange Law, Art. 16, the indorser of a protested bill incurs no mercantile engagement. See, too, Italian Code, Art. 260.

Bill payable
at a future
time.

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable (*f*):

- (1) At a fixed period after date or sight (*g*):
- (2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain (*h*).

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event not cure the defect (*i*).

ILLUSTRATIONS.

The following are valid, viz., orders to pay:—

1. Ten days after the death of X. (*k*).
2. Two months after H.M. ship *Swallow* is paid off (*k*).
3. On the 1st January, when X. comes of age (*l*).

(*f*) By sect. 3, *ante*, a bill must be payable either on demand or at a fixed or determinable future time.

(*g*) See sect. 14 (2), (3), as to fixing the due date of such bills in ordinary cases, and sect. 65 (5) as to the due date when accepted for honour.

(*h*) See *Colehan v. Cooke* (1742), Willes, 393, at p. 399; *Carlos v. Fancourt* (1794), 5 T. R. 482.

(*i*) New York Negotiable Instruments Law, § 23.

(*k*) *Colehan v. Cooke* (1742), *supra*.

(*l*) *Goss v. Nelson* (1757), 1 Burr. 226.

§ 11.

4. One year after notice (*m*).
5. One year after my death (*n*).
6. Two months after demand in writing (*o*).
7. Five years after the opening of the S. Railway (*p*) (?).

The following are invalid as bills, viz., orders to pay:—

8. When I marry X. (*q*).
9. When I am in good circumstances (*r*).
10. Thirty days after the arrival of ship *Swallow* at Calcutta (*s*).
11. Ninety days after sight, or when realized (*t*).
12. Ninety days after the dissolution of partnership between C. and X. and the settling of the books (*u*).

“Certainty,” says Ashhurst, J., “is a great object in negotiable instruments, and unless they carry their own validity on the face of them they are not negotiable. On that ground bills which are only payable on a contingency are not negotiable, because it does not appear on the face of them whether or not they will ever be paid” (*x*). Under the continental codes, such forms as are given in Illustrations 1 to 7 would probably be invalid. A bill, however, may be made payable at a particular fair or market (*en foire*), though the day on which it will be held is not known. Such bills seem to have been anciently known in England as “billæ nundinales” (*y*). Bills and notes payable “en foire” are said to be now obsolete everywhere except in Russia.

See further notes to sect. 73 (cheques), *post*.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where

Omission of date in bill payable after

- (*m*) *Clayton v. Gosling* (1826), 5 B. & C. 360.
 (*n*) *Roffey v. Greenwell* (1839), 10 A. & E. 222.
 (*o*) *Price v. Taylor* (1860), 5 H. & N. 540; 29 L. J. Ex. 331.
 (*p*) Cf. *Ex parte Gibson* (1869), L. R. 4 Ch. 662. No objection raised. See *contrà*, *Blackman v. Lehman* (1879), 35 Amer. R. 57.
 (*q*) *Pearson v. Garret* (1689), 4 Mod. 242.
 (*r*) *Ex parte Tootell* (1798), 4 Ves. 372.
 (*s*) *Palmer v. Pratt* (1824), 2 Bing. 185.
 (*t*) *Alexander v. Thomas* (1851), 16 Q. B. 333.
 (*u*) *Sackett v. Palmer* (1857), 25 New York R. 179.
 (*x*) *Carlos v. Fancourt* (1794), 5 T. R. at p. 486.
 (*y*) Cf. *Colehan v. Cooke* (1742), Willes, at p. 399. See French Code, Art. 133; German Exchange Law, Art. 33; Italian Code, Art. 252.

§ 12.
date, or
acceptance
after sight.

the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date (z).

See "issue" and "holder," defined by sect. 2; "good faith" by sect. 90, and "holder in due course" by sect. 29.

This section was added in committee. Before its enactment the English law on the subject dealt with was very obscure. When a bill comes from a foreign country undated the holder frequently cannot know the exact intended date. He knows when the mail left, but does not know on what previous day the bill was issued. The present section throws any possible inconvenience that may arise on the negligent party who omitted to date the bill or acceptance. In Scotland, under the 19 & 20 Vict. c. 60, s. 10, now repealed, oral evidence might be given to prove the true date. See sect. 20, *post*, for the general rule as to material omissions in a bill, and the consequences of supplying them, and sect. 64 as to material alterations.

French Code, Art. 122, provides that if a bill be payable after sight and the acceptance be not dated, time runs from the date of the bill; but see *Nouguier*, § 498. Art. 115 of the Netherlands Code contains a similar provision.

Presumption
as to date
being true
date.

13. (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall,

(z) New York Negotiable Instruments Law, § 32.

unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be *(a)*. § 13.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday *(b)*. Ante-dating,
post-dating,
and Sundays.

ILLUSTRATIONS.

1. B. gives a blank acceptance in 1857. The drawer, by inadvertence, fills it up as a bill dated 1856. The holder can recover from the acceptor.

2. A bill, bearing date 1st May, is endorsed by the payee to D. It appears that the payee died in the previous April. D. may show that the bill was post-dated, and he can then recover from the parties liable thereon *(d)*.

3. The payee of a post-dated cheque pays it in to his bankers, who credit him with the amount. If the cheque is stopped, the banker can recover the amount from the drawer *(e)*.

Sub-sect. 1 is declaratory of the common law *(f)*. Inasmuch as the bankruptcy laws are expressly saved by sect. 97 (1), the Act presumably does not affect the rule that when a bill is tendered in bankruptcy proceedings as evidence of the petitioning creditor's debt, the date of the bill must be confirmed by independent evidence *(g)*.

The *primâ facie* presumption arising from the date may be rebutted, *e.g.*, for the purpose of ousting the Statute of Limitations *(h)*.

The Acts which for fiscal purposes prohibited the post-dating of cheques or bills payable on demand were repealed by the Stamp Act, 1870 *(i)*. To ascertain

(a) New York Negotiable Instruments Law, § 30, see *Crawford's* edition. If the date is an impossible one, the law will adopt the nearest possible day, *e.g.*, September 30, when the bill bears date September 31.

(b) Cf. New York Negotiable Instruments Law, § 31.

(c) *Armfield v. Allport* (1857), 27 L. J. Ex. 42.

(d) *Pasmore v. North* (1811), 13 East, 517; *Usher v. Dauncey* (1814), 4 Camp. 97.

(e) *Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.; cf. *Robinson v. Benkel* (1913), 29 T. L. R. 475 (indorsee *v.* indorser of post-dated cheque originally given for losses at cards).

(f) *Roberts v. Bethell* (1852), 12 C. B. at p. 778.

(g) Cf. *Anderson v. Weston* (1840), 6 Bing. N. C. at p. 301.

(h) Cf. *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

(i) *Gatty v. Fry* (1877), 2 Ex. D. 265. See *Royal Bank of*

§ 13.

whether under the stamp law the instrument is admissible in evidence only the terms of the instrument itself need be regarded (*k*); and the fact that a cheque is post-dated does not make it irregular within the meaning of sect. 29 (1) so as to charge the holder with equities of which he had no notice (*l*). For many purposes a post-dated cheque is equivalent to a bill payable after date (*m*), and it is clear that if a banker pays a post-dated cheque before its due date he does so at his own risk. The drawer of a post-dated cheque is under no obligation to stop payment of it for the benefit of a third person, *e.g.*, the payee's trustee in bankruptcy (*n*). Bankers licensed under the Bank Notes Act, 1828 (9 Geo. 4, c. 23), are, by sect. 12, liable to a penalty for issuing post-dated bills or notes unstamped; and under the suspended Act 7 Geo. 4, c. 6, there was a penalty for post-dating bills under 5*l*.

To ante-date a bill or note in order to defraud a third party may amount to forgery (*o*).

In *Begbie v. Levi*, decided in 1830 (*p*), the Court seemed to think that a bill issued on a Sunday would be void in the hands of a holder with notice, but they suggested qualifications. The Act now removes this difficulty.

14. Where a bill is not payable on demand (*q*), the day on which it falls due is determined as follows:—

- (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of pay-

Scotland v. Tottenham, 2 Q. B. 715, C. A., decided on the Stamp Act, 1891.

(*k*) *Ibid.*, and *Bull v. O'Sullivan* (1871), L. R. 6 Q. B. 209, at p. 213.

(*l*) *Hitchcock v. Edwards* (1889), 60 L. T. N. S. 636; *Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.; *Robinson v. Benkel* (1913), 29 T. L. R. 475.

(*m*) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

(*n*) *Ex parte Richdale* (1882), 19 Ch. D. 409, C. A.

(*o*) Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), sect. 1; *R. v. Ritson* (1869), L. R. 1 C. C. R. 200 (deed). As to bills which were ante-dated to defraud creditors, see *Re Gomersall* (1875), 1 Ch. D. 137, C. A.; *Jones v. Gordon* (1877), 2 App. Cas. 625.

(*p*) *Begbie v. Levi* (1830), 1 Cr. & J. 180.

(*q*) As to when a bill is payable on demand, see sect. 10, *ante*.

ment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that— § 14.

- (a) When the last day of grace falls on Days of grace. Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day (*r*), the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;
- (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday (*s*)) under the Bank Holidays Acts, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day. [34 & 35 Vict. c. 17.]

ILLUSTRATIONS.

Subject to the proviso:—

1. A note dated 31st January is payable "without grace" one month after date. It is due on February 28th. A similar note, dated January 1st, would be due on February 1st (*t*).

2. A note for 100*l.* is made payable by two equal instalments, on January 1st and February 1st. The instalments fall due on January 4th and February 4th (*u*).

3. A bill dated January 1st is payable thirty days after date. It is due on February 3rd.

4. A non-negotiable note, not payable on demand, is entitled to days of grace (*x*).

(*r*) As to the law before the Act, see *Chitty on Bills*, ed. 10, p. 262.

(*s*) Christmas Day and Good Friday are bank holidays in Scotland, not common law holidays.

(*t*) Cf. *Roehner v. Knickerbocker Life Ass. Co.* (1875), 63 New York R. 160.

(*u*) *Oridge v. Sherborne* (1843), 11 M. & W. 374.

(*x*) *Smith v. Kendall* (1794), 6 T. R. 123.

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5. A bill dated 28th November, a bill dated 29th November, and a bill dated 30th November, each being payable three months after date, all fall due on March 3rd, when February has but twenty-eight days.

6. A bill is dishonoured by non-payment on the last day of grace. No right of *action* till the next day (*y*).

It is believed that all countries, except those where the Greek Church is the prevailing religion, use the New Style, or Gregorian Calendar.

A suggestion to abolish days of grace, in accordance with recent legislation in many foreign countries, was made in committee but withdrawn. The number of days of grace allowed in different countries differed considerably, but it is believed that they have now been abolished in all countries except England and some of her colonies and dependencies, and some states in the United States (*z*). Originally, as the name implies, days of grace were a matter of favour, but they have long been a matter of right. Thus, presentment for payment on the second day of grace is invalid (*a*). The allowance of days of grace is regulated by the *lex loci solutionis*, irrespective of the country where the bill is drawn: see sect. 72 (*5*), *post*.

As to the term "business day," see sect. 92. It excludes both statutory and common law holidays.

It was suggested in committee that the effect of statutory and common law holidays should be assimilated, and that when a bill fell due on a non-business day it should be payable in all cases on the succeeding business day; but this was opposed by the bankers. It was said that when two holidays came together it was convenient that the due date of some bills should be thrown back, and of others thrown forward, in order to obviate too great a press of business on any one day. But this argument has lost its force now that early closing on Saturday has become general. Moreover, Saturday is the Jewish Sabbath. In no country except the United Kingdom is any distinction drawn between common law and statutory holidays. In Scotland, Christmas Day and Good Friday

(*y*) *Kennedy v. Thomas*, (1894) 2 Q. B. 759, C. A.

(*z*) See French Code, Art. 135; German Exchange Law, Art. 33; Italian Code, Art. 290; New York Negotiable Instruments Law, § 145, and notes thereto in *Crawford's* edition, specifying the other States which have abolished days of grace.

(*a*) *Wiffen v. Roberts* (1795), 1 Esp. 262.

are bank holidays, but it was agreed to assimilate Scotch law to English law as regards bills falling due on those days. In assimilating the law of the two countries, one case appears to have been lost sight of, namely, when Christmas Day falls on Saturday. In such case it appears from the latter part of clause (b) that bills which fall due on the Sunday in Scotland would be payable on the succeeding business day, while in England they would be payable on the preceding business day.

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Formerly foreign bills were sometimes drawn payable at one or more usances. By "usance" is meant customary time, that is to say, the time for payment as fixed by custom, having regard to the place where the bill is drawn and the place where the bill is payable. Thus, if the usance between London and Amsterdam is one month, a bill drawn in Amsterdam dated 1st January, and payable in London "at double usance," falls due on 4th March (b). It was stated at the Hague conferences that the practice of drawing bills at "usance," instead of after date or sight, is now everywhere obsolete. But in mercantile language, where it is the practice in a particular trade to draw bills at a particular currency, *e.g.*, ninety days after sight, this currency is often referred to as the usance of that trade.

Usances.

- (2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment (c).
- (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the

After date or sight bills.

(b) Cf. *Mutford v. Walcott* (1698), 1 Ld. Raym. 574; *Nouguier*, § 144.

(c) *Campbell v. French* (1795), 6 T. R. at p. 212; *Story*, § 329; cf. German Exchange Law, Art. 32; New York Negotiable Instruments Law, § 146.

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bill be noted or protested for non-acceptance, or for non-delivery (*d*).

Month.

(4) 'The term "month" in a bill means calendar month (*e*).

ILLUSTRATIONS.

1. The holder of a foreign bill, payable sixty days after sight, makes an agreement that if it be dishonoured by non-acceptance, he will re-present it for payment at maturity. Acceptance is refused. The time of payment must be calculated from the day the bill was protested, and not from the day of presentment to the drawee for acceptance (*f*).

2. A bill is payable three months after sight. The acceptance bears date January 1st. The bill is due on April 4th.

3. Bill payable after sight is noted for non-acceptance on January 1st. It is accepted *suprà protest* on January 5th. The time of payment must be calculated from January 1st, not from January 5th (*g*).

As a promissory note cannot be accepted, "after sight" in a note, means after mere exhibition to the maker (*h*). A bill presented for acceptance is usually left for twenty-four hours with the drawee, but the custom is for the acceptance to bear date the day of presentment, and not the day of return to the holder—*e.g.*, a bill presented on a Saturday during business hours is accepted and returned on the Monday; the acceptance should bear date of the Saturday. The holder is probably entitled to this as a matter of right. Cf. sect. 42, *post*, and notes thereto. Compare sect. 18 (3) as to the acceptance of a bill which has previously been refused acceptance.

Case of need.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the

(*d*) *Campbell v. French* (1795), 6 T. R. 200; cf. sect. 18 (3), *post*.

(*e*) *Webb v. Fairmaner* (1838), 3 M. & W. 473; French Code, Art. 132.

(*f*) *Campbell v. French* (1795), 6 T. R. 200; cf. French Code, Art. 131; German Exchange Law, Art. 32.

(*g*) See sect. 65 (5), *post*, which accords with custom, and overrides the dictum in *Williams v. Germaine* (1827), 7 B. & C. at p. 471.

(*h*) *Sturdy v. Henderson* (1821), 4 B. & Ald. 592; cf. sect. 89 (3), *post*.

holder may resort in case of need, that is to say, § 15. —
in case the bill is dishonoured by non-acceptance
or non-payment. Such person is called the referee
in case of need. It is in the option of the holder
to resort to the referee in case of need or not, as
he may think fit.

The referee in case of need is sometimes called the
drawee in case of need, or simply the "case of need." A
bill must be protested or noted for protest before it can
be presented to the case of need: see sects. 65, 67, 68.
The concluding words of the section settle the moot point,
whether presentment to the case of need is obligatory or
optional in the United Kingdom. In some parts of the
United States presentment is, perhaps, obligatory (*i*), and
in India it is clearly obligatory (*j*). Under the continental
codes presentment to the case of need is usually obliga-
tory, but then it provided that the case of need must be in
the same place where the bill is payable (*k*). In England
this is not so; for instance, a bill drawn on Liverpool
often names a case of need in London. It may possibly
be necessary in some cases to present to the case of need in
England, in order to charge a foreign drawer or indorser
in his own country, for an English statute is of course only
binding in British Courts. However, in most countries
the duties of the holder would be held to be regulated by
the *lex loci solutionis*.

16. The drawer of a bill, and any indorser, Special stipulations by drawer or indorser restricting liability.
may insert therein an express stipulation—
(1) Negating or limiting his own liability to
the holder:

ILLUSTRATION.

The holder of a bill indorses it to D. thus: "Pay D. or order
without recourse to me," or "Pay D. or order *sans recours*" (*l*).

(*i*) *Story*, § 65; but no American case is cited. The New York
Negotiable Instruments Law, § 215, adopts the English section
verbatim.

(*j*) Indian Negotiable Instruments Act, s. 115.

(*k*) See *Nouguier*, § 244. The case of need is known in France as
the *besoin* or *recommandataire*.

(*l*) *Goupy v. Harden* (1816), 7 Taunt. at p. 163.

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or "Pay D. or order at his own risk" (*m*), or "Pay D. or order without recourse, unless presented within 30 days." The indorser thereby passes his interest to D., but negatives or limits his liability as an indorser (*n*).

Waiving
holder's
duties.

(2) Waiving as regards himself some or all of the holder's duties.

ILLUSTRATION.

C., the holder of a bill, indorses it to D., adding the words "notice of dishonour waived." No subsequent party is obliged to give notice of dishonour to C.

An indorsement negating or limiting liability is sometimes called a qualified indorsement (*o*).

Compare sects. 33 and 35 as to conditional and restrictive indorsements. It has been held in the United States that an indorser "without recourse" is responsible to the same extent that a transferor by delivery is responsible, *e.g.*, where the bill is a forgery (*p*). As to the ordinary liability of an indorser, see sect. 55 (2), *post*; and as to the liability of a transferor by delivery, see sect. 58, *post*. As to indorsements or guarantees by parties who have never been holders, see sect. 56, *post*.

The provisions of this section are limited to the drawer or indorser. An acceptor may accept conditionally: see sect. 19, *post*; but he cannot accept so as to make himself secondarily, and not primarily, liable on the bill. Thus, where in Scotland a drawee accepted "as cautioner," it was held that this might be evidence that he was an accommodation acceptor, but that it did not alter his primary obligation to the holder to pay the bill (*q*).

An indorsement waiving the holder's duties relates only to the indorser's liability, and does not otherwise affect the negotiation of the bill. Such stipulations are resorted to when the payment of the bill is doubtful, and the drawer

(*m*) *Rice v. Stearns* (1807), 3 Massachusetts R. 224.

(*n*) Cf. *Castrique v. Buttigieg* (1855), 10 Moore, P. C. pp. 110—112, 117; German Exchange Law, Art. 14; *Nouguier*, §§ 268—270.

(*o*) Cf. New York Negotiable Instruments Law, § 68.

(*p*) *Dumont v. Williamson* (1867), reported in England, 17 L. T. N. S. 71; *Hannum v. Richardson* (1875), 21 Amer. R. 152; New York Negotiable Instruments Law, § 115.

(*q*) 1 *Bell, Com.* 424, 7th ed. Cf. *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 781; and Italian Code, Arts. 266, 268.

or indorser wishes to save expense in case of its return. In the United States it has been held that an indorsement in the above form dispenses with the necessity of notice to all subsequent indorsers (*r*); and in France a similar construction has been put on the phrases, "*Retour sans frais*," "*Retour sans protêt*," and "*Sans compte de retour*" (*s*). It is very doubtful whether the English Act would bear such an interpretation.

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17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

Definition
and requisites
of acceptance.

ILLUSTRATIONS.

1. Bill addressed to B. X. writes an acceptance on it. X. is not liable as acceptor (*t*).

2. Bill addressed to B. B. accepts it. X. also writes an acceptance on it. X. is not liable as acceptor (*u*).

3. Bill addressed to B. B. accepts it, and before issue X. backs it with his signature. X. is not liable as acceptor, and parol evidence is not admissible to show that he guaranteed payment of the bill to the drawer (*x*).

4. Bill addressed to the "Directors of the B. Company, Limited." The acceptance is signed by two directors and the manager. The manager is not liable as acceptor (*y*).

5. Bill addressed to B. & Co. B., a partner in the firm, accepts it in the firm's name, adding also his own name. This is the acceptance of the firm, and not of B. personally (*z*).

6. Bill addressed to B. and X. B. alone accepts. B. is liable as acceptor (*a*).

7. Bill addressed to B. & Co. X., a partner in that firm, accepts it in his own name: He is liable as acceptor (*b*).

8. Bill addressed to B., who is a partner in the firm of X. & Co.

(*r*) *Daniel*, § 1090; *Parshley v. Heath* (1879), 31 Amer. R. 246.

(*s*) *Nouguier*, § 259. The expression "*sans compte de retour*" also negatives the right to draw a re-draft.

(*t*) *Davis v. Clarke* (1844), 6 Q. B. 16.

(*u*) *Jackson v. Hudson* (1810), 2 Camp. 447. *Qu.* if X. is liable as indorser? See *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 770.

(*x*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754.

(*y*) *Bull v. Morrell* (1840), 12 A. & E. 745.

(*z*) *Re Barnard, Edwards v. Barnard* (1886), 32 Ch. D. 447, C. A.

(*a*) *Owen v. Von Uster* (1850), 10 C. B. 318. See, too, sect. 19 (2) (*e*), *post*.

(*b*) *Owen v. Von Uster, supra*; and see sect. 23 (2), *post*.

§ 17. B. accepts in the firm name. B. is personally liable as acceptor (c).

9. Bill addressed to William B. His wife accepts it, signing the acceptance "Mary B." If he authorizes her so to accept, or afterwards promises to pay the bill, he is liable as acceptor (d). *Sed qu.* now that husband and wife are no longer one legal persona?

10. A bill is addressed to the B. Company, Limited. Two of the directors accept it, signing thus: "J. S. and H. T. directors of the B. Co., Limited." This is an acceptance by the company (e).

11. A bill is addressed to "J. B., general agent of the X. Company." He accepts it thus: "Accepted on behalf of the company.—J. B." J. B. is personally liable as acceptor (f).

12. A bill is addressed to the Saltash Steam Packet Co., the proper name of the company being the Saltash Steam Packet Co., Limited. It is accepted by "J. M., Secretary to the Company." This is not the acceptance of the company, but, by virtue of sects. 42 and 47 of the Companies Act, 1862, J. M. is personally liable (g).

13. Instrument in the form of a bill which is addressed to no one. B. writes an acceptance on it. B. may be liable as the maker of a note, but not as an acceptor (h).

14. A firm of "Cormack Brothers" dissolved partnership, and Carter, an agent, was appointed to wind it up. M. Cormack had been a partner in the firm. Carter accepted, for his own purposes, a bill drawn on "Cormack Brothers," signing the acceptance "M. Cormack and R. Carter." Held, that M. Cormack was not liable on this acceptance (i).

15. A bill is addressed to "X. & Co." The proper style of the firm is "B. X. & Co.," and it is accepted in that name. This is a valid acceptance (k).

After the drawee has accepted a bill he is thenceforth termed the "acceptor." By sect. 2, *ante*, unless the

(c) *Nicholls v. Diamond* (1853), 9 Exch. 154.

(d) *Lindus v. Bradwell* (1848), 5 C. B. 583.

(e) *Okell v. Charles* (1876), 34 L. T. N. S. 822, C. A.; *Stacey & Co. v. Wallis* (1912), 28 T. L. R. 209.

(f) *Herald v. Connah* (1876), 34 L. T. N. S. 885; *Mare v. Charles* (1856), 5 E. & B. 978. See *contra* an American case, *Laffin v. Sinsheimer* (1877), 30 Amer. R. 472.

(g) *Penrose v. Martyr* (1858), E. B. & E. 499, decided on 19 & 20 Vict. c. 47; and *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377. See now sect. 63 of 8 Edw. 7, c. 69.

(h) *Felder v. Marshall* (1861), 30 L. J. C. P. 158.

(i) *Odell v. Cormack* (1887), 19 Q. B. D. 223.

(k) *Lloyd v. Ashby* (1831), 2 B. & Ad. 23. Note that head note to *Kirk v. Blurton* (1841), 9 M. & W. 284, is incorrect, the action being against the drawer, not the acceptor.

context otherwise requires, "acceptance" means an acceptance completed by delivery or notification. As to such delivery or notification, see sect. 21, *post*.

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Subject to the provisions of the Act as to acceptance for honour (sects. 65—68), *post*, and to the special case provided for by sect. 63 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), *post*, p. 410, it is clear law, both in England and Scotland, that no person other than the drawee can be liable as acceptor of a bill (*l*).

Illustrations 6 and 7 show that when a bill is addressed to two or more persons, whether partners or not, any one may accept so as to bind himself.

Illustrations 7 and 8 exemplify the rule of English law, that a firm name or signature is merely a compendious form of expressing the names or signatures of all the partners in that firm.

Illustrations 9 to 11 appear to show that in construing an acceptance the address to the drawee and the acceptance must be read together *ut res magis valeat* (*m*). An agent who signs a bill for his principal without authority, though not liable on the instrument, may be liable to the holder in an action for falsely representing that he had authority (*n*).

It is to be noted that *Lindus v. Bradwell* (Illustration 9) was decided before the Acts which required an acceptance to be signed by the acceptor (*o*); but the Court seems to rest on its decision on the ground that, though a bill must be accepted by the drawee, he may accept in any name he chooses to adopt, and that, in this case, William B. chose to adopt *pro hac vice* the name of his wife to accept in (*p*).

In *Mason v. Rumsey*, a bill was addressed to a firm. One of the partners accepted it in his own name, and it was held that the firm was liable on this acceptance (*q*). But this case was decided before the 19 & 20 Vict. c. 97, s. 6, which required an acceptance to be signed by the

(*l*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, and cases *supra*.

(*m*) Cf. *Alexander v. Sizer* (1869), L. R. 4 Ex. at p. 105.

(*n*) *Polhill v. Walter* (1832), 3 B. & Ad. 114; *West London Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.

(*o*) See 19 & 20 Vict. c. 97, s. 6, now repealed and reproduced in this section.

(*p*) *Lindus v. Bradwell* (1848), 5 C. B. at p. 591, per Maule, J. *Sed qu.* now that husband and wife are no longer one legal *persona*?

(*q*) *Mason v. Rumsey* (1808), 1 Camp. 384. See *contra* an American case, *Cunningham v. Smithson* (1841), 12 Leigh. 32.

§ 17. drawee, and is presumably no longer law. It is clear that the partner who signed would be liable (r).

Requisites in form.

(2) An acceptance is invalid unless it complies with the following conditions, namely ;

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.
- (b) It must not express that the drawee will perform his promise by any other means than the payment of money (s).

ILLUSTRATIONS.

1. A. draws a bill on B. B. writes thereon the word "Accepted," but does not sign it. This is not an acceptance.

2. A. draws a bill on B. B. writes a letter to A. promising to pay the bill, and shows the letter to the holder. This is not an acceptance.

3. The drawee of a bill writes an acceptance on the back of it. This is (probably) sufficient (t).

4. A bill is drawn on B. for 100*l*. B. accepts it, "payable in bills" or "payable in goods." This is invalid (u).

5. A bill is left with B. for acceptance. He does not accept it, but retains it for a long time and ultimately destroys it. B. is not liable as acceptor; the holder's remedy is by action for the conversion of the bill (x).

As to signature of drawee by hand of his agent, see sect. 91, *post*. As to the acceptance of a bill, in a set, see sect. 71 (4), *post*. The first part of clause (a) reproduces

(r) *Owen v. Von Uster* (1850), 10 C. B. 318.

(s) Cf. New York Negotiable Instruments Law, §§ 220, 221.

(t) *Young v. Glover* (1857), 3 Jur. N. S. 637, per Ld. Campbell. Spanish bills are sometimes accepted on the back. New York Negotiable Instruments Law, § 221, requires the acceptance to be on the face of the bill.

(u) *Russell v. Phillips* (1850), 14 Q. B. 891; cf. *Boehm v. Garcias* (1807), 1 Camp. 425, n.; and see sect. 3 (2), *ante*. When the time of payment comes, the holder may, of course, accept goods or bills in satisfaction of the debt due to him. Cf. sect. 19 (2) (b), *post*. But see sect. 223 of the New York Negotiable Instruments Law.

(x) *Jeune v. Ward* (1818), 1 B. & Aid. 653, at p. 660. But note sect. 53, *post*, under which a bill may operate in Scotland as an assignment of funds in hands of drawee.

the effect of the repealed 19 & 20 Vict. c. 97, s. 6, which provided that the acceptance of a bill, whether inland or foreign, must be written on the bill itself and signed by or on behalf of the acceptor. The second part of the clause reproduces the effect of the repealed 41 & 42 Vict. c. 13, which provided that the mere signature of the drawee on the bill should be deemed a sufficient acceptance, and which was passed to override the case of *Hindhaugh v. Blakey*, where such an acceptance was held insufficient (*y*).

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As to cancellation of acceptance, see sect. 21 (1), *post*.

At common law a verbal acceptance was valid (*z*), and New York Negotiable Instruments Law, §§ 222, 233, makes an unconditional promise in writing to accept equivalent to acceptance, if the bill be taken on the faith of it. The usual mode of accepting is for the drawee to write "accepted" across the face of the bill, and then to sign his name underneath; but the drawee may use any form of words from which the intention to accept can be gathered. Some of the continental codes (*e.g.*, the Spanish Code) require the precise term "accepted" to be used.

18. A bill may be accepted;

Time for acceptance.

(1) Before it has been signed by the drawer, or while otherwise incomplete (*a*):

(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment.

(3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled

Date of acceptance, after previous dishonour.

(*y*) *Hindhaugh v. Blakey* (1878), 3 C. P. D. 136; cf. *Steele v. M'Kinlay* (1880), 5 App. Cas. at pp. 782, 785.

(*z*) *Bank of Ireland v. Archer* (1843), 11 M. & W. 383. It was even held that the undue mention of a bill by the drawee might amount to an acceptance: see *Harvey v. Martin* (1808), 1 Camp. 425, n. See *Billing v. Devaux* (1841), 3 M. & Gr. 565, as to an acceptance by letter.

(*a*) See sect. 20, *post*; *London and South Western Bank v. Wentworth* (1880), 5 Ex. D. 96.

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to have the bill accepted as of the date of first presentment to the drawee for acceptance.

ILLUSTRATIONS.

1. A. draws a bill on B., dated January 1st, payable one month after date. The holder presents it for acceptance in March. B. accepts. As regards B. this is a valid acceptance of a bill payable on demand (*b*).

2. The holder of a bill payable one month after sight presents it to the drawee for acceptance. Acceptance is refused. A week after it is re-presented, and accepted. The acceptance is valid (*c*).

Sub-sect. (3) was added in committee. It accords with mercantile practice, and was intended to secure that, apart from special agreement, the holder should be put, as far as possible, in the same position as if the bill had not been dishonoured. It has been adopted by § 226 of the New York Negotiable Instruments Law.

Presumption
as to time.

Unless the contrary appear by its terms, a bill of exchange is *primâ facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance (*d*). For example, B. accepts, without dating, a bill drawn payable three months after date. He attains his majority the day before the bill matures. This is *primâ facie* evidence that B. accepted it while an infant (*d*).

General
and qualified
acceptances.

Qualified
acceptances.

19. (1) An acceptance is (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (*e*).

(*b*) *Mutford v. Walcot* (1698), 1 Ld. Raym. 574; and sect. 10 (2).

(*c*) *Wynne v. Raikes* (1804), 5 East, 514.

(*d*) *Roberts v. Bethell* (1852), 12 C. B. 778.

(*e*) New York Negotiable Instruments Law, § 227, and cases cited in *Crawford's* edition.

In particular an acceptance is qualified which § 19.
is—

- (a) conditional, that is to say, which makes Conditional.
payment by the acceptor dependent on the
fulfilment of a condition therein stated :

ILLUSTRATIONS.

1. The drawee of a bill accepts it, "Accepted—payable on giving up bills of lading for clover per ship *Amazon*" (*f*).

2. Or he accepts it, "Accepted—payable when in funds" (*g*).

3. A. draws a bill on B., payable to himself or order. B., when accepting it, writes over his acceptance the words "in favour of A. only," and the words "or order" are struck out. This is not a qualified acceptance, and the negotiability of the bill is not restricted (*h*).

- (b) partial, that is to say, an acceptance to pay Partial.
part only of the amount for which the bill is
drawn :

ILLUSTRATIONS.

1. Bill drawn on B. for 100*l.* B. accepts it as to 50*l.* (*i*).

2. Bill drawn on B. for 100*l.* B. accepts it, payable half in money, half in goods. This is valid as a qualified acceptance for 50*l.* (*k*).

- (c) local, that is to say, an acceptance to pay Particular
place only.
only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere (*l*) :

(*f*) *Smith v. Vertue* (1860), 30 L. J. C. P. 56.

(*g*) *Ibid.*, and *Julian v. Shobrooke* (1753), 2 Wils. 9.

(*h*) *Decroix v. Meyer*, (1891) A. C. 520, H. L. The words written by the acceptor might be taken as a mere memorandum; *aliter*, if they had run "accepted in favour of A. only."

(*i*) Cf. *Wegersloff v. Keene* (1709), 1 Stra. 214; and see sect. 44 (2), *post*.

(*k*) *Petit v. Benson* (1697), Comberb. 452; cf. *Rowe v. Young* (1820), 2 Bligh, H. L. at p. 409; 2 B. & B. 165.

(*l*) Cf. New York Negotiable Instruments Law, § 228, and notes in *Crawford's* edition.

§ 19.

ILLUSTRATIONS.

1. The drawee of a bill accepts it "payable at Messrs. Smith & Co.," his bankers. This is a general acceptance (*m*).

2. The drawee of a bill accepts it "payable at the Union Bank and not elsewhere," or "payable only at the Union Bank." This is a qualified acceptance (*n*).

3. Bill accepted in London, payable at the X. Bank, Kandy, in Ceylon, and dishonoured. This is a general acceptance, and the acceptor may be sued in England (*o*).

Time.

(d) qualified as to time (*p*):

ILLUSTRATIONS.

1. A. draws a bill on B., payable two months after date. B. accepts it, payable six months after date (*q*).

2. B. accepts a bill drawn on him, "on condition that it be renewed," for six months (*r*).

Some of
several
drawees.

(e) the acceptance of some one or more of the drawees, but not of all.

ILLUSTRATION.

Bill drawn on B., X., and Y. B. accepts. X. and Y. refuse to accept. This is a qualified acceptance (*s*).

By sect. 44, *post*, the holder may refuse to take a qualified acceptance. If he takes it, he must give notice to the drawer and indorsers, who (except in the case of a partial acceptance) may decline to be bound by it. The continental codes admit a partial acceptance, but make any other condition equivalent to a refusal to accept (*t*). As to the effect of this conflict of laws, see sect. 72, *post*. An acceptance is, whenever possible, to be construed as

(*m*) Cf. *Halstead v. Skelton* (1843), 5 Q. B. 86, Ex. Ch.

(*n*) *Ibid*.

(*o*) *Ex p. Hayward* (1887), 3 T. L. R. 687.

(*p*) The validity of such an acceptance must of course be subject to the provisions of the Stamp Acts.

(*q*) *Russell v. Phillips* (1850), 14 Q. B. 891; cf. *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314.

(*r*) *Ibid*.

(*s*) *Marius*, No. 16; New York Draft Code, § 1784; *Nouguier*, § 451.

(*t*) See German Exchange Law, Art. 22; French Code, Art. 124; Netherlands Code, Art. 120.

general, not qualified; and a mere memorandum, such as a wrong due date, inconsistent with such construction, has been rejected as being no part of the acceptance (*u*). Whether acceptance is general or qualified is a question of law (*x*).

§ 19.

In an action by holder against acceptor, Byles, J., says: "The simple meaning of an acceptance is 'I will pay.' So translating the word 'accepted' what is meant by saying 'accepted payable on giving up bill of lading'?" It is impossible, I think, to contend that this is not a conditional acceptance. Then it is said that this being a conditional acceptance, the bill of lading must be handed over to the acceptor on the day when the bill falls due [and if not, that the acceptor is discharged]. Now, it seems to me that this is not so, but that the qualification merely qualifies the acceptor's obligation throughout the whole extent of that obligation; and that, as between the holder and the acceptor, that obligation exists for six years at all events" (*y*). See further sect. 52 (2), *post*.

As to partial acceptances, see further sect. 44 (2), *post*.

Sub-sect. (2) (c) reproduces the effect of the repealed 1 & 2 Geo. 4, c. 78, which was passed to override the case of *Rowe v. Young*, where it was held that an ordinary acceptance payable at a banker's was a qualified acceptance (*z*). See further sects. 44, 45 (4), and 52 (2).

The particular cases specified in sub-sect. (2) do not profess to be exhaustive. Where a bill was drawn payable "in effective" an acceptance payable in "denaros" was held to be qualified (*a*).

The continental codes admit partial, but prohibit conditional acceptances.

This section has no application to notes: see sects. 87 and 89.

(*u*) *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314; cf. *Stone v. Metcalfe* (1815), 4 Camp. 217; *Fitch v. Jones* (1855), 5 E. & B. at p. 246; *Decroix v. Meyer*, (1891) A. C. 520, H. L.

(*x*) *Sproat v. Matthews* (1786), 1 T. R. 182.

(*y*) *Smith v. Vertue* (1860), 30 L. J. C. P. at p. 60.

(*z*) *Rowe v. Young* (1820), 2 Bligh, H. L. 391; 2 B. & B. 165.

The whole question of qualified acceptances is here discussed at length.

(*a*) *Boehm v. Garcias* (1808), 1 Camp. 425, n.; but *qu.* if such an acceptance would not be invalid under sect. 17 (2) (b)?

§ 20.

Inchoate
instruments
or blank
signatures.

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill (*b*), it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover (*c*), using the signature for that of the drawer (*d*), or the acceptor (*e*), or an indorser (*f*); and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit (*g*).

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time (*h*), and strictly in accordance with the authority given (*i*). Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been

(*b*) *Facendale v. Bennett* (1878), 3 Q. B. D. at p. 531, C. A.; *Smith v. Prosser*, (1907) 2 K. B. at p. 753, C. A.

(*c*) *Swan v. N. B. Australasian Co.* (1863), 2 H. & C. at p. 184; 32 L. J. Ex. 273.

(*d*) *Collis v. Emmet* (1790), 1 H. Bl. 313.

(*e*) *Molloy v. Delves* (1831), 7 Bing. 428.

(*f*) *Foster v. Mackinnon* (1869), L. R. 4 C. P. at p. 712; *Glenie v. Bruce Smith*, (1908) 1 K. B. 263, C. A.; as explained, *Shaw v. Holland and Neal*, (1913) 2 K. B. 15, C. A. Cf. *Russell v. Langstaffe* (1780), 2 Dougl. 514, 516; "the indorsement on a blank note is a letter of credit for an indefinite sum," per Lord Mansfield.

(*g*) *Crutchly v. Mann* (1814), 5 Taunt. 529; and cases, *supra*; cf. New York Negotiable Instruments Law, § 33.

(*h*) *Temple v. Pullen* (1853), 8 Exch. 389; *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

(*i*) *Avde v. Dixon* (1851), 6 Exch. 869; *Hanbury v. Lovett* (1868), 18 L. T. N. S. 366; *Oakley v. Boulton* (1888), 5 Times L. R. 60, C. A.

filled up within a reasonable time and strictly in accordance with the authority given (*k*). § 20.

ILLUSTRATIONS.

1. Bill drawn payable to ——— or order. Any holder for value may write his own name in the blank, and sue on the bill (*l*).

2. B., who is indebted to C., gives him a blank acceptance for 100*l*. C. dies. If C.'s administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer, he can enforce payment thereof against the acceptor (*m*).

3. B., who is indebted to C., gives him a blank acceptance for 100*l*., and then dies. C. may fill in his own name as drawer and payee after B.'s death, and recover the amount from B.'s estate (*n*).

4. B., having authority to do so, gives a blank acceptance for 100*l*. in the name of his firm. It is filled up after B.'s death. The surviving partners are liable (*o*).

5. B. gives C. a blank acceptance to accommodate him, and without receiving value. After B.'s death it is filled up and discounted with D., who sees it filled up. D. cannot recover the amount from B.'s estate (*p*).

6. B. gives a blank acceptance to a money-lender, who fills it up as a bill payable to drawer's order, inserting a fictitious signature as that of drawer and indorser. If the bill afterwards gets into the hands of a holder in due course he can recover from B. (*q*).

7. B. puts a blank acceptance of his own in his desk. It is *stolen*, and then filled up as a bill. Even a holder in due course cannot recover from B., for he never delivered the inchoate instrument for the purpose of conversion into a bill (*r*).

8. B. gives a blank acceptance in the name of his firm to C. without the authority of his co-partners. C. gives the bill in this state to his own partner for a private debt, who then fills in the

(*k*) *Schultz v. Astley* (1836), 2 Bing. N. C. 544; *Foster v. Mackinnon* (1869), L. R. 4 C. P. at p. 712; cf. New York Negotiable Instruments Law, § 33; and cases cited in *Crawford's* edition.

(*l*) *Crutchley v. Mann* (1814), 5 Taunt. 529.

(*m*) *Scard v. Jackson* (1875), 34 L. T. N. S. 65.

(*n*) *Carter v. White* (1882), 20 Ch. D. 225; affirmed (1883), 25 Ch. D. 666, C. A., where it was held that a surety for the acceptor, not party to the bill, was not discharged.

(*o*) *Usher v. Dauncey* (1814), 4 Camp. 97.

(*p*) *Hatch v. Scarles* (1854), 2 Sm. & G. 147; 24 L. J. Ch. 22; approved *France v. Clark* (1884), 26 Ch. D. 257, at p. 262, C. A.

(*q*) *Schultz v. Astley* (1836), 2 Bing. N. C. 544; *London & S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96.

(*r*) *Bazendale v. Bennett* (1878), 3 Q. B. D. 525, C. A.

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name of C.'s firm as drawer and payee. C.'s firm cannot recover on this bill from B.'s firm (s).

9. B. and X. sign as makers a joint and several note, with blanks for date and payee's name. B. signs on condition that the note shall only be issued if Y. also will join as a maker. Y. refuses to join. X., who is in possession of the note, represents to plaintiff that he has authority to issue it. He fills in plaintiff's name as payee, and transfers the note to him for value. Plaintiff cannot recover from B. (t).

10. B. signs as acceptor a bill on a 6*l.* stamp, with the amount left blank. In the margin is 4*l.* This is fraudulently altered to 40*l.*, and the bill is filled up for forty pounds. A holder in due course can recover 40*l.* from B. (u).

11. B., a bankrupt, gives a blank acceptance. It is filled up and negotiated after his discharge. The holder can recover, for it did not constitute a provable debt (x).

12. In 1840 B. gives a blank acceptance on a 5*s.* stamp to A. to accommodate him. In 1852 A. fills up the document as a bill for 200*l.* and signs as drawer. He then negotiates it to a holder in due course. The holder can recover from the acceptor (y).

13. An incomplete bill (no drawer's signature) which is sent by railway and lost, is not a security for the payment of money within the meaning of the Carriers Act (z).

14. Document in the form of a bill payable to drawer's order, but not signed by the drawer, is accepted by B., and returned by him to the proposed drawer, who dies before signing it. The drawer's executors cannot sue B. on this instrument, but it may be evidence of a debt from B. to the drawer's estate (a).

15. A drawer in Bavaria signs a bill with the amount and date left in blank. His agent in England fills up the blanks, and in fraud of the drawer indorses it away for a private debt. A holder in due course can recover on it, and it is not material that the bill bears only a foreign bill stamp (b).

16. B., intending to borrow 15*l.* from X., signs a blank stamped paper, and authorises X. to fill it up as a note for 15*l.* payable to X. X., instead of so doing, fills up the document as a promissory note for 30*l.* payable to C., and then hands it to C., who takes it in good faith and for value. This is not a negotia-

(s) *Hogarth v. Latham* (1878), 3 Q. B. D. 643, C. A.

(t) *Awde v. Dixon* (1851), 6 Exch. 869.

(u) *Garrard v. Lewis* (1882), 10 Q. B. D. 30.

(x) *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94; 27 L. J. C. P. 286; cf. *Ex parte Hayward* (1871), L. R. 6 Ch. 546.

(y) *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

(z) *Stoessiger v. S. E. Railway Co.* (1854), 3 E. & B. 549; but such an instrument, if in the hands of the drawer, might be a security for money within the 24 & 25 Vict. c. 96: *Reg. v. Bowerman*, (1891) 1 Q. B. 112.

(a) *Lawson's Exors. v. Watson* (1907), 9 F. 1353 (Scotland).
Qu. if executors could complete by signing as drawers?

(b) Cf. *Barker v. Sterne* (1854), 9 Exch. 684.

tion of the note to a holder in due course, and C. cannot recover (c). *Sed quære?*

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17. B. signs, as maker, a blank stamped paper, and gives it to X., authorising him to fill it up as a note for 250*l.*, to secure an advance which C. is to make to X. X. fraudulently fills it up as a note for 1,000*l.* payable to C., who has in good faith advanced 1,000*l.* B. is estopped from setting up X.'s fraud, and C. is entitled to recover the 1,000*l.* from B. (d).

18. B., in South Africa, signs his name on a blank unstamped paper, on which is a lithographed form of a promissory note, and hands it to T., his agent, to be retained until further instructions. T. fraudulently fills up the blanks and negotiates the note to C., who in good faith gives full value to T. The instrument is stamped in England as a foreign note, and the maker is sued thereon by C. He is not liable, for he did not deliver the document for the purpose of being filled up and negotiated (e).

19. B., the acceptor of a bill, is asked to renew it. He accordingly signs his name on the *back* of a blank stamped bill form. This is an authority to fill it up as a bill making B. liable as an indorser, not as acceptor (f).

20. A. draws a cheque to bearer, filling up the space for figures with 2*l.*, but leaving in blank the space for showing the amount in words. A confidential clerk fills in the space for words "one hundred and twenty pounds," and alters the 2*l.* into 120*l.* If the clerk misappropriates the cheque and gets it cashed, the bank can debit A.'s account with 120*l.* (g).

This section is supplemented by sect. 12, *ante*, which provides for the special case of a bill payable after date, or an acceptance payable after sight being issued undated. See "holder" defined by sect. 2, and "holder in due course" by sect. 29, *post*, and note that it enters into the latter definition that the bill is "complete and regular on the face of it"; if not, *caveat emptor*.

In *Hatch v. Searles* (h), Vice-Chancellor Stuart says: "As to a *bonâ fide* holder the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he

(c) *Herdman v. Wheeler*, (1902) 1 K. B. 361. See a distinction suggested between the payee of a note and a holder in due course. But see next case.

(d) *Lloyds' Bank v. Cooke*, (1907) 1 K. B. 794, C. A., doubting and distinguishing *Herdman v. Wheeler*, (1902) 1 K. B. 361.

(e) *Smith v. Prosser*, (1907) 2 K. B. 735, C. A.

(f) *Belfast Banking Co. v. Keown* (1898), 33 Ir. L. T. R. 95, Palles, C.B.

(g) *London Joint Stock Bank v. Macmillan*, (1918) A. C. 777, H. L.

(h) *Hatch v. Searles* (1854), 2 Sm. & G. 147; approved *France v. Clark* (1884), 26 Ch. D. 257, at p. 262, C. A.

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can be fastened with notice of that imperfection. If the holder has notice of the imperfection he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorser who gave it in blank. But if he be a *bonâ fide* holder without notice, he must have taken the negotiable instrument in a perfect shape and in terms a complete contract."

An instrument which is wanting in some one or more of the requisites of a complete bill is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities, *e.g.*, an authority coupled with an interest is not revoked by the death of donor or donee, while an authority not coupled with an interest is revoked by the donor's death; see Illustrations 2 to 5. The liabilities of the parties accrue from the time when the instrument is issued in a complete form, and not from the time when their signatures are attached (*i*).

The section refers only to blank signatures, &c. on stamped paper. Incomplete instruments on unstamped paper are outside the section, and are governed by the ordinary common law rules as to estoppel. See, *e.g.*, Illustration 18.

The New York Negotiable Instruments Law, § 34, in order to give effect to the principle of such cases as *Baxendale v. Bennett* (Illustration 7), enacts that "where a negotiable instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

Delivery to
complete
contract.

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or accord-

(*i*) *Montague v. Perkins* (1853), 22 L. J. C. P. 187 (Statute of Limitations); *Ex parte Hayward* (1871), L. R. 6 Ch. 546 (petitioning creditor's debt).

ing to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable (*j*). § 21.
Delivery.

ILLUSTRATIONS.

1. B., who owes C. 100*l.*, makes a note for the amount payable to C. B. dies, and the note is afterwards found among his papers. C. has no right to this note, and if it be given to him he cannot enforce it (*k*).

2. B. makes a note in favour of his servant, and hands it to his solicitor, telling the solicitor to retain the note till his death, and then hand it to the servant, if still in his service. B. dies, and the solicitor hands the note to the servant. The servant can (perhaps) prove for the amount in the administration of B.'s estate (*l*).

3. B. makes a note in favour of C., and delivers it to a stakeholder (*e.g.*, trustee under composition deed). C. thereby acquires no property in the note (*m*).

4. C., the holder of a bill, specially indorses it to D., and transmits it by post to X., his own agent. X. informs D. that he has received the bill, but does not give it him or undertake to hold it on his account. C. (probably) can revoke the transaction and cancel his indorsement to D. (*n*).

5. C., the holder of a bill, specially indorses it to D., and incloses it in a letter addressed to D. The letter, which is put in the office letter-box, is stolen by a clerk of C.'s, who forges D.'s indorsement and negotiates the bill. The property in the bill remains in C. (*o*).

6. By the regulations of the English Post Office, a letter once posted cannot be reclaimed. If, then, the indorsee of a bill authorize the indorser to transmit it to him by post, the property in the bill passes to the indorsee, and the indorsement becomes complete as soon as the letter which contains the bill is posted (*p*).

(*j*) *Cox v. Troy* (1822), 5 B. & Ald. 474; *Nouguier*, § 551. The drawee, unlike the drawer or indorser, has no property in the bill, therefore less is required to make him attorn to the holder. By German Exchange Law, Art. 21, an acceptance once written cannot be cancelled.

(*k*) Cf. *Bromage v. Lloyd* (1847), 1 Exch. 32.

(*l*) *Re Richards* (1887), 36 Ch. D. 541; criticised *Re Whitaker* (1889), 42 Ch. D. 119, at p. 125, O. A.

(*m*) Cf. *Latter v. White* (1872), L. R. 5 H. L. 578.

(*n*) *Brind v. Hampshire* (1836), 1 M. & W. 365; *Muller v. Pondir* (1873), 55 New York R. 325. *Quære*, since the Judicature Acts?

(*o*) Cf. *Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 584.

(*p*) *Ex parte Cote* (1873), L. R. 9 Ch. 27; *Sichel v. Borch* (1864), 2 H. & C. 954; 33 L. J. Ex. 179; *Kleinwort v. Comptoir D'Escompte*, (1894) 2 Q. B. at p. 158 (crossed cheque sent by post from Barcelona to England and stolen in transit). But if there be no authority,

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7. The holder of a note payable to bearer wishes to remit money to D. For safety of transmission he cuts the note in half and posts one half to D. Before he posts the second half he changes his mind, and writes to D. demanding back the half he has sent. He is entitled to do so, for a partial delivery is ineffectual (*q*).

8. A bill is left with the drawee for acceptance. The drawee writes an acceptance on it. The next day the holder calls for the bill: he is merely informed that it is mislaid, and is requested to call the next day. In the meantime the drawee hears that the drawer has failed. He accordingly cancels his acceptance, and the next day delivers the dishonoured bill back to the holder. This is no acceptance; the drawee was entitled to cancel it (*r*).

9. A firm is indebted to D. X., who is a partner in the firm, and also agent for D., writes the firm's indorsement on a bill held by the firm, and puts the bill with some other papers of D.'s of which he has the custody. This is a valid indorsement by the firm, and the property in the bill passes to D. (*s*).

10. In reply to a letter requesting payment of a debt, the debtor sends by post to his creditor a cheque for the amount. The cheque is stolen in the post, and the thief gets it cashed. The posting is a good delivery to the payee, and the cheque operates as payment (*t*).

By sect. 2, *ante*, "delivery" means transfer of possession, actual or constructive, from one person to another. "To constitute a contract," says Bovill, C.J., "there must be a delivery over of the instrument by the drawer or indorser for a good consideration, and as soon as these circumstances take place the contract is complete, and it becomes a contract in writing" (*u*). "In order to make the property in bills pass," says Mellish, L.J.; "it is not sufficient to indorse them. They must be delivered to the indorsee or to the agent of the indorsee. If the indorser

express or implied, to send by post, the instrument is so sent at sender's risk: *Pennington v. Crossley* (1897), 13 Times L. R. 513, C. A. As to the usual practice to remit money by crossed cheque, and not by posting bank notes, see *Mitchell Henry v. Norwich Union* (1917), 34 T. L. R. 77.

(*q*) *Smith v. Mundy* (1860), 29 L. J. Q. B. 172; cf. *Redmayne v. Burton* (1860), 2 L. T. N. S. 324.

(*r*) *Bank of Van Diemen's Land v. Bank of Victoria* (1871), L. R. 3 C. P. 526.

(*s*) *Lysaght v. Bryant* (1850), 9 C. B. 46.

(*t*) *Norman v. Ricketts* (1886), 3 T. L. R. 182, C. A.; *Thairwall v. Great Northern Railway*, (1910) 2 K. B. 509 (dividend warrant sent by post). If the lost draft is not cashed the payee's remedy is under sects. 69 and 70, *post*.

(*u*) *Abrey v. Cruz* (1869), L. R. 5 C. P. at p. 42. See, too, *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them" (x).

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Illustrations 6 and 10 show that the Post Office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the Post Office is the agent of the sender.

Post Office.

(2) As between immediate parties, and as regards a remote party other than a holder in due course (y), the delivery—

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be (z);

By whom.

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill (a).

Conditional delivery.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved (b).

Presumption as to delivery.

(x) *Ex parte Cote* (1873), L. R. 9 Ch. 27, where the question was the effect of the French post office regulations.

(y) See "holder in due course" defined by sect. 29, and "delivery" by sect. 2.

(z) *Bromage v. Lloyd* (1847), 1 Exch. 32; cf. *Re Richards* (1887), 36 Ch. D. 541; as criticised *Re Whitaker* (1889), 42 Ch. D. 119, C. A.

(a) *Bell v. Lord Ingestre* (1848), 12 Q. B. at p. 319; cf. *Salmon v. Webb* (1852), 3 H. L. Ca. at p. 518; *Castrique v. Buttigieg* (1855), 10 Moore, P. C. at p. 108; *Druiff v. Parker* (1868), L. R. 5 Eq. at p. 137; *Benton v. Martin* (1873), 52 New York R. at p. 574.

(b) Cf. New York Negotiable Instruments Law, § 35.

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ILLUSTRATIONS.

1. The holder of a bill specially indorses it to D., and dies before delivering it, but his executor subsequently hands the bill to D. The indorsement to D. is invalid, for an executor is not the agent of his testator. D. cannot sue on the bill (*c*).

2. X., by means of a false pretence, or a promise or condition which he does not fulfil, induces A. to draw a cheque in favour of C. X. delivers it to C., who receives it *bonâ fide* and for value. C. acquires a good title, and can sue the drawer, for X. is ostensibly the drawer's agent (*d*).

3. A. draws a cheque payable to bearer, intending to pay it to X. It is *stolen* from his desk before he issues it, and is subsequently negotiated to C., who takes it for value and without notice. C. (perhaps) acquires a good title and can sue A. (*e*).

4. B. makes a note payable to C., who sues him on it. B. can defend himself by showing that the note was delivered to C. on condition that it was only to operate if he should procure B. to be restored to a certain office, and that B. was not so restored (*f*).

5. C., the holder of a bill, indorses it in blank and hands it to D. on the express condition that he shall forthwith retire certain other bills forthwith. He does not do so. D. cannot sue C., and if he sue the acceptor, the latter may set up the *jus tertii* (*g*).

6. C., the holder of a bill, indorses it specially to D., in order that he may get it discounted for him. D., in breach of trust, negotiates the bill to E. If he take the bill *bonâ fide* and for value, he acquires a good title, and can sue all the parties thereto. If he do not so take it, he cannot sue C.; and if he sue the acceptor, the latter may set up that the bill is C.'s (*h*); further, C. can bring an action against E. to recover the bill or the proceeds (*i*).

7. C., the payee of a bill, indorses it to D. D. sues C. as indorser. C. may show that he and D. were jointly interested

(*c*) *Bromage v. Lloyd* (1847), 1 Exch. 32. See this case distinguished, *Giddings v. Giddings* (1878), 31 Amer. R. 682.

(*d*) *Watson v. Russell* (1862), 3 B. & S. 34; 31 L. J. Q. B. 304; affirmed, 5 B. & S. 968, Ex. Ch.; 11 L. T. N. S. 641; and cf. *Clutton v. Attenborough*, (1897) A. C. 90, H. L.; *Talbot v. Von Boris*, (1911) 1 K. B. 854, at p. 862, C. A.; but see *Herdman v. Wheeler*, (1902) 1 K. B. 361, as to the original payee of a promissory note.

(*e*) *Ingham v. Primrose* (1859), 7 C. B. N. S. at p. 85; 28 L. J. C. P. 294; *Kinyon v. Wohlford* (1872), 10 Amer. R. 165; but see *Baxendale v. Bennett* (1878), 3 Q. B. D. 531, C. A.

(*f*) *Jefferies v. Austin* (1725), 1 Stra. 674.

(*g*) *Bell v. Lord Ingestre* (1848), 12 Q. B. 317; cf. *Seligman v. Huth* (1877), 37 L. T. N. S. 488.

(*h*) *Lloyd v. Howard* (1850), 15 Q. B. 995; and cf. *Barber v. Richards* (1851), 6 Exch. 63.

(*i*) *Goggerley v. Cuthbert* (1806), 2 B. & P. N. R. 170; cf. *Alsager v. Close* (1842), 10 M. & W. 576; *Muttyloll Seal v. Dent* (1853), 8 Moore, P. C. 319.

in the bill, and that he indorsed to the latter to collect on joint account (*k*).

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8. B. makes a note for 100*l.* payable to C. or order. C. sues B. Evidence is admissible to show that the note was given as collateral security for a running account, and what the state of that account is (*l*).

9. B. makes a note in favour of C., and hands it to X., to deliver it to C., if he shall remain in B.'s service till B.'s death. After B.'s death, X. hands the note to C. C. (perhaps) may prove for the amount against B.'s estate (*m*).

See "holder in due course," defined by sect. 29. Conditional delivery. Where the person to whom a bill is delivered conditionally or for a special purpose misappropriates it, the true owner may sue that person or any one else who takes it from him with notice of the facts for the conversion of the bill (*n*), or if the bill has been collected the true owner may waive the tort and sue for the proceeds as money received to his use (*o*).

Escrow.—A deed delivered conditionally is called an "escrow," and by analogy the term is sometimes applied to bills. There is, however, this distinction: a deed cannot be delivered conditionally to the obligee; the delivery must be to a third party (*p*). Where a bill is delivered conditionally or for a special purpose, the relations between the person who so delivers it and the person to whom it is delivered are substantially those of principal and agent (*q*). The person to whom it is delivered belongs, perhaps, to the class of agents called bailees (*r*); at least, if the terms "bailor" and "bailee" be used in the extensive sense given to them by Story in his work on *Bailments*.

By the term "immediate parties" is meant parties who

(*k*) *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

(*l*) Cf. *Ex parte Twogood* (1812), 19 Ves. 227; *Re Boys* (1870), L. R. 10 Eq. 467.

(*m*) *Re Richards* (1887), 36 Ch. D. 541; but see comments in *Re Whitaker* (1889), 42 Ch. D. 119, 125, C. A.

(*n*) *Goggerley v. Cuthbert* (1806), 2 B. & P. N. R. 170; *Alsager v. Close* (1842), 10 M. & W. 576.

(*o*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 585. See *Muttyloll Seal v. Dent* (1853), 8 Moore, P. C. 319.

(*p*) Per Lord Denman, in *Bell v. Lord Ingestre* (1848), 12 Q. B. at p. 319.

(*q*) *Maguire v. Dodd* (1859), 9 Ir. Ch. 452.

(*r*) Cf. *Lloyd v. Howard* (1850), 15 Q. B. at p. 1000, Erle, J.; *Manley v. Boycot* (1853), 2 E. & B. at p. 56, Ld. Campbell.

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are in direct relation with each other. Thus the drawer and the acceptor, the drawer and the payee, the indorser and the next indorsee are immediate parties (*s*). But, as the illustrations show, a remote party may, through absence of consideration, notice of fraud, or other circumstances, stand on the same footing as an immediate party. Conversely, perhaps, parties who *primâ facie* are immediate parties may be shown to be really remote and not in direct relation, as, for instance, when the maker of a note is induced by the fraud of a third person to make it in favour of a payee who takes it in good faith and for value (*t*).

Contracts of parties to bill are contracts in writing.

A bill or note must be in writing, and so, too, must the supervening contracts thereon, such as acceptance or indorsement. It follows that the contracts of the various parties, as interpreted by this Act and by the law merchant, are subject to the ordinary rule as to written contracts (*u*). Oral evidence is inadmissible in any way to contradict or vary their effect. But it is admissible (*a*) to show that what purports to be a complete contract has never come into operative existence (*x*); (*b*) to impeach the consideration for the contract (*y*); (*c*) to show that the contract has been discharged by payment, release or otherwise (*yy*). Thus—

1. The mere signature of the holder on the back of a bill (indorsement in blank) is a contract in writing to this effect: 1. I hereby assign this bill to bearer. 2. I hereby undertake that if the bearer duly present this bill, and it is not honoured, I, on receiving due notice, will indemnify him (*z*).

2. A. draws a bill in favour of C., and issues it to him for value. A. thereby incurs the ordinary obligations of a drawer. If the bill be dishonoured and C. sue A., oral evidence cannot be admitted to show that A.'s liability as

(*s*) Cf. Indian Act, s. 44.

(*t*) *Lloyds' Bank v. Cooke*, (1907) 1 K. B. 794, C. A. See judgment of Moulton, L.J.; *Watson v. Russell* (1862), 3 B. & S. 34.

(*u*) *Foster v. Jolly* (1835), 1 C. M. & R. 703.

(*x*) Sect. 21 (2), and cases cited in illustration; also *Hitchings v. Northern Leather Co. of America* (1914), 20 Com. Cas. at p. 28.

(*y*) Cf. *Abrey v. Crux* (1869), L. R. 5 C. P. at p. 45.

(*yy*) Cf. *Morris v. Baron & Co.*, (1918) A. C. 1 H. L. (oral rescission of written contract), and note sect. 62, *post*, as to express waiver.

(*z*) Cf. *Suse v. Pompe* (1860), 30 L. J. C. P. 75, at p. 80, and sect. 55.

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drawer was conditional on the performance of certain acts by C., and that C. had not done them (*a*).

3. Bill drawn in ordinary form. Action by payee against acceptor. Evidence is not admissible to show that it was intended to be paid out of a particular fund which is no longer available (*b*).

4. Bill drawn conditionally. Evidence is not admissible to show that the condition has been performed, and that therefore the bill is no longer conditional and invalid. A bill must be valid *ab initio* (*c*).

5. B. makes a note payable to C. one month after date. C. sues B. Parol evidence is not admissible to show that it was intended to be payable two months after date (*d*).

6. Bill drawn and accepted in the ordinary form. Parol evidence is admissible to show that the holder knew that the bill was accepted for the accommodation of the drawer, and that he gave time to the drawer, thereby discharging the acceptor, whom he knew to be a mere surety (*e*).

7. Note payable fourteen days after date. Parol evidence is not admissible to show that the note was not to be enforced if a verdict was obtained in an action between third parties (*f*).

8. Bill payable six months after date. Evidence may be given of a contemporaneous *written* agreement to renew the bill on request (*g*).

9. Action on bill of exchange payable three months after date by indorsee against acceptor. Evidence is not admissible of a contemporaneous oral agreement with the drawer to renew the bill if the acceptor is not in a position to pay it at maturity, even though the indorsee was aware of the fact when he took the bill (*h*).

(*a*) *Abrey v. Crux* (1869), L. R. 5 C. P. 37; cf. sect. 61.

(*b*) *Campbell v. Hodgson* (1819), Gow, 74; cf. *Richards v. Richards* (1831), 2 B. & Ad. at pp. 454, 455.

(*c*) *Colehan v. Cooke* (1742), Willes, 397; cf. sect. 11 (2), *ante*.

(*d*) Cf. *Drain v. Harvey* (1855), 17 C. B. 257.

(*e*) *Ewin v. Lancaster* (1865), 6 B. & S. 571; *Overend v. Oriental Finan. Corp.* (1847), 7 H. L. 348; *Hubbard v. Gurney* (1876), 64 New York R. 457.

(*f*) *Foster v. Jolly* (1835), 1 C. M. & R. 703.

(*g*) *Maillard v. Page* (1870), L. R. 5 Ex. 312. "If the agreement is merely collateral, it only affords ground for a cross-action [or counter-claim], but there are many cases in which it has been held that the bill and the writing together form only one contract." Per Channell, B., at p. 319.

(*h*) *New London Credit Syndicate v. Neale*, (1898) 2 Q. B. 487, C. A.; following *Young v. Austen* (1869), L. R. 4 C. P. 553.

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10. Action on a bill for 90*l*. Evidence is not admissible to show that the acceptor and drawer agreed that only 60*l*. should be paid, and that the payment should be by instalments, even though the indorsee is not a holder for value (*i*).

11. A promissory note is made payable on demand. Evidence is not admissible to prove an oral agreement that payment should not be enforced till after the maker's death (*k*).

12. C. makes an advance to B. of 500*l*., and B. subsequently gives him a note for that amount. Evidence, it seems, is not admissible to show that the principal was not intended to be repaid, and that the note was only given to secure payment of interest during C.'s life (*l*).

13. Bill drawn in the ordinary form, payable to drawer's order, and accepted. D. writes his name on the back. Parol evidence is not admissible to show that he intended thereby to guarantee the payment of the bill to the drawer. The Statute of Frauds requires such a guarantee to be in writing and signed (*m*).

14. A note made by a company is indorsed by three directors in succession. In an action for contribution evidence is admissible to show that they indorsed as co-sureties, and not as sureties in succession (*n*).

15. Promissory note given in payment for goods supplied to the maker. D. indorses the note as surety, making a verbal agreement with the payee that he is not to be liable if the goods are not equal to sample. Evidence if this agreement is not admissible (*o*).

As between immediate parties, a contemporaneous writing (*p*), or a subsequent written agreement (*q*), may control the effect of a bill, subject to the same conditions

(*i*) *Besant v. Cross* (1851), 10 C. B. 895.

(*k*) *Woodbridge v. Spooner* (1819), 3 B. & Ald. 233; cf. *Stott v. Fairlamb* (1883), 52 L. J. Q. B. 420.

(*l*) *Hill v. Wilson* (1873), L. R. 8 Ch. App. 888, at p. 898.

(*m*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, H. L.

(*n*) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P. C.; cf. *Batson v. King* (1859), 28 L. J. Ex. at p. 328.

(*o*) *Hitchings v. Northern Leather Co. of America*, (1914) 3 K. B. 907. As a fact the maker kept the goods. *Semble* if he had rejected them D. could have set up total failure of consideration.

(*p*) Cf. *Brown v. Langley* (1842), 4 M. & Gr. 466; *Salmon v. Webb* (1852), 3 H. L. Ca. 510; *Maillard v. Page* (1870), L. R. 5 Ex. 312, at p. 319.

(*q*) *McManus v. Bark* (1870), L. R. 5 Ex. 65.

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that would be requisite in the case of an ordinary contract: but the mere fact that a bill refers to a collateral writing or agreement which is conditional in its terms, will not vitiate the bill in the hands of a person who has no notice of its contents (*r*).

Though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a collateral or prior oral agreement by cross-action or counter-claim. "Evidence," says Byles, J., "may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent" (*s*).

(*r*) *Jury v. Barker* (1858), E. B. & E. 459. See English and American cases reviewed: *Taylor v. Curry* (1871), 109 Massachusetts, 36.

(*s*) *Lindley v. Lacey* (1864), 34 L. J. C. P. 7, at p. 9 (written agreement, prior oral agreement to take up plaintiff's acceptance). For limits of this rule, see *Henderson v. Arthur*, (1907) 1 K. B. 10, C. A.

§ 22.

Capacity and Authority of Parties.

Capacity of parties.

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto (*t*).

Sub-sect. (1) is declaratory. Sub-sect. (2) is probably declaratory, but the law was not very clear. The word "minor" was added in committee as the Scottish equivalent of the English term "infant."

Capacity and authority.

Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again, capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often valid where an executory contract cannot be enforced. An indorsement usually consists of two distinct contracts, one executed, the other executory. It transfers the property in the bill, and it also

involves a contingent assumption of liability on the part of the indorser.

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When laws conflict, capacity is for some purposes determined according to the *lex domicilii* of the contracting party, but for mercantile purposes it is probably determined by the *lex loci contractus* (u).

Conflict of laws.

The continental codes for the most part draw a distinction between traders and non-traders, but English law now draws no such distinction as regards capacity to contract by bill or note.

The incapacity of one or more of the parties to a bill in no way diminishes the liability of the other parties thereto (x). Thus the acceptor cannot set up the incapacity of the drawer (sect. 54 (2)), and the drawer cannot set up the incapacity of the acceptor or payee, and the indorser cannot set up the incapacity of the drawer or a previous indorser. (Sect. 55.)

Incapacity of one party.

A clergyman, though liable to penalties for trading, has full capacity to contract by bill (y).

Clergyman.

As to convicted felons, see the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 14 and 15.

Felon.

As to a foreign sovereign who in general can sue but cannot be sued, unless he chooses to submit himself to the jurisdiction, see *post*, p. 368.

Foreign sovereign.

At common law a married woman incurred no liability by drawing, indorsing, or accepting a bill (z), unless she was a sole trader in the City of London, or unless her husband was *civilitur mortuus*, or an alien resident abroad. Subject, also, to the like exceptions, her indorsement did not transfer the property in a bill (a), unless she indorsed it with her husband's consent (b). In equity, however, if a married woman having available separate estate drew, indorsed, or accepted a bill, she was liable to the extent of

Married woman.

(u) Cf. *Sottomayor v. De Barros* (1877), 3 P. D. 1, at p. 5, C. A. (marriage); but as to mercantile contracts, see *Westlake's International Law*, 3rd ed. p. 44; *Dicey's Conflict of Laws*, ed. 2, p. 538.

(x) Cf. *Grey v. Cooper* (1782), 3 Dougl. 65; *Wauthier v. Wilson* (1912), 28 T. L. R. 239, C. A. (joint and several note); German Exchange Law, Art. 3.

(y) Cf. The Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 29, 31; *Lewis v. Bright* (1855), 24 L. J. Q. B. 191.

(z) *Cannam v. Farmer* (1849), 3 Exch. 698, note signed by married woman as widow.

(a) Cf. *Smith v. Marsack* (1848), 18 L. J. C. P. 65.

(b) *Prince v. Brunat* (1835), 1 Bing. N. C. 435.

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such estate (*c*); and if the bill was part of her separate estate, her indorsement transferred it.

Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), as amended by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), a married woman who draws, accepts, or indorses a bill can be sued thereon as if she were single. But if judgment be obtained against her, the judgment does not bind her personally. It is only available against such separate estate as she may have free from restraint on anticipation (*d*). If a married woman signs a bill or note as surety for her husband no presumption arises that she has done so under undue influence (*e*). When a married woman indorses a bill her indorsement of course transfers the property therein.

Divorced woman.

A woman who is divorced, or a woman who is judicially separated from her husband, is on the same footing as a single woman. See the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21—26.

Lunatic or drunken man.

The contracts of a lunatic or drunken man, known to be such, are voidable and not void (*f*). It is clear, therefore, that neither lunacy nor drunkenness can be set up against a holder in due course (*g*). Complete drunkenness is a defence against an immediate party with notice (*h*).

Minor or infant.

An infant incurs no liability by drawing, indorsing, or accepting a bill, even if he represents himself to be of full age (*i*). Thus:—

1. B., an infant, within three months of attaining his

(*c*) *McHenry v. Davies* (1870), L. R. 10 Eq. 88.

(*d*) *Wood v. Lewis*, (1914) 3 K. B. 73, C. A. (duration of restraint); as to form of judgment, see *Seton on Decrees*, ed. 7, p. 847; as to dissolution of marriage, see *Barnett v. Howard*, (1900) 2 Q. B. 784, C. A. (restraint operating on bill accepted before divorce); as to ante-nuptial debts, see *Robinson v. Lynes*, (1894) 2 Q. B. 577, discussed *Lush's Husband and Wife*, ed. 3, p. 192.

(*e*) *Howes v. Bishop*, (1909) 2 K. B. 390, C. A.

(*f*) *Pollock on Contracts*, ed. 7, p. 91. As to proving against a lunatic's estate on a voluntary note, see *Re Whitaker* (1889), 42 Ch. D. 119, C. A. As to revocation of agent's authority by notice of principal's lunacy, see *Drew v. Nunn* (1879), 4 Q. B. D. 661, C. A.

(*g*) *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 599, C. A.

(*h*) *Gore v. Gibson* (1845), 13 M. & W. 623; cf. *Tyler v. Maxwell* (1892), 30 Sc. L. R. 583, 585, Court of Session (acceptance given when drunk for losses at cards).

(*i*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62); *Levene v. Brougham* (1909), 25 T. L. R. 265, C. A. (prom. note); *Leslie, Ltd. v. Shiel*, (1914) 3 K. B. 607, C. A. (loan), and if the substance

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majority, accepts a bill payable six months after date. He ratifies the transaction on attaining his majority, and the bill is negotiated. B. is not liable on his acceptance (*k*).

2. B., after attaining his majority, accepts a bill to pay a debt contracted before his majority. The bill is indorsed to a holder in due course. The holder can sue B. (*l*).

3. B., after attaining his majority, accepts a bill to compromise a joint liability on a bill which he accepted during his minority. He is not liable to a holder with notice (*m*).

4. An infant and his father make a joint and several promissory note in consideration of money advanced to the infant. The father is liable on this note as a principal debtor (*n*).

5. An infant gives for value a post-dated cheque, dating it a few days after attaining his majority. He is not liable on this cheque (*o*).

If the consideration for a bill given by an infant be necessities supplied to him, he may be liable on the consideration, though not on the bill (*p*). The age at which infancy ceases differs in different countries. In most continental countries a distinction is drawn between infant traders and non-traders, the former having full capacity. It was formerly held in England that if an infant traded and accepted bills he was estopped from setting up his infancy (*q*), but this ruling is no longer law (*r*).

By this section, when a bill is payable to the order of an infant, his indorsement transfers the property therein (*s*). As an infant may be an agent, his indorsement in that character gives rise to no difficulty. In America

of the action be contract, the infant cannot be made liable by suing him in tort, see at pp. 613, 620.

(*k*) *Ex parte Kibble* (1875), L. R. 10 Ch. 373.

(*l*) *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

(*m*) *Smith v. King*, (1892) 2 Q. B. 543.

(*n*) *Wauthier v. Wilson* (1912), 28 T. L. R. 239, C. A.

(*o*) *Hutley v. Peacock* (1913), 30 T. L. R. 42.

(*p*) *Ex parte Margrett, Re Soltykoff*, (1891) 1 Q. B. 413, C. A.; cf. *Chalmers' Sale of Goods Act*, notes to § 2.

(*q*) *Ex parte Lynch* (1876), L. R. 2 Ch. D. 227.

(*r*) *Ex parte Jones* (1881), 18 Ch. D. 109, C. A.

(*s*) Cf. *Lebel v. Tucker* (1867), 8 B. & S. at p. 833; *Nightingale v. Withington* (1818), 15 Mass. 272; *Grey v. Cooper* (1782), 3 Dougl. 65.

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Liability of
company or
corporation.

it is not uncommon to get a bill made payable to the order of an infant clerk. His indorsement then operates as an indorsement *sans recours*, though without openly discrediting the bill.

A corporation incurs no liability by drawing, indorsing, or accepting a bill, unless expressly or impliedly empowered by its act of incorporation so to do (*t*). Thus:—

1. A joint stock company is incorporated for the purpose of forming a *société anonyme* abroad for the construction of railways. The directors are empowered by the memorandum and articles of association to do whatever they may from time to time think incidental or conducive to the main object of the company. These terms cover the issue of bills, and such a company is liable on its acceptance (*u*).

2. A railway company, incorporated under an ordinary Railway Act, accepts bills which are negotiated. The company is not liable on its acceptances (*x*).

In the case of a trading corporation the fact of incorporation for the purposes of trade would give capacity. In the case of non-trading corporations, the power must be expressly given, or there must be terms in the charter wide enough to include it. The Companies Act, 1862, s. 47 (*y*), did not confer capacity on all companies under that Act. It merely prescribed the mode in which such companies as had the requisite capacity were to exercise it (*z*). A mining company, a cemetery company, a salvage company, a gas company, an alkali works company, and a waterworks company, have been held to be non-trading companies (*a*). See *post*, p. 79, as to non-trading partnerships. There is this distinction: A non-trading partnership can adopt a bill, but the bill of a company lacking capacity is, as regards the company, incurably bad; for a contract *ultra vires* of a corporation cannot be ratified. Query, if the rule as to drawing bills or making notes

(*t*) *Re Peruvian Railways Company* (1867), L. R. 2 Ch. 617; cf. *Sinclair v. Brougham*, (1914) A. C. 398, H. L. (building society carrying on *ultra vires* banking business).

(*u*) *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617.

(*x*) *Bateman v. Mid Wales Railway Co.* (1866), L. R. 1 C. P. 499.

(*y*) Repealed and reproduced by sect. 77 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*z*) Cf. *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617.

(*a*) *Bateman v. Mid Wales Railway Co.* (1866), L. R. 1 C. P. 499, at p. 505.

applies to cheques? Is a non-trading corporation liable on the instrument to the bearer of a dishonoured cheque which it has drawn, or is it only liable on the consideration to its immediate obligee? The practice of paying by cheque is so universal that perhaps capacity to contract by cheque may be presumed. In America, the capacity of a corporation to bind itself by bill or note is co-extensive with its capacity to contract (*b*). The capacity of a company ceases when a resolution to wind it up has been passed, although the resolution may not have been notified in the *Gazette* (*c*).

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By this section, when a bill is payable to the order of a corporation, the indorsement of the corporation passes the property therein, though from want of capacity the corporation may not be liable as indorser (*d*). So, too, bankers may be justified in paying cheques out of the funds of a company where clearly, by the form of the cheques, the company would not be liable as drawers if they had not been paid (*e*).

Power of
corporation
to transfer.

At common law an alien enemy is a person (other than a prisoner of war) who resides or carries on business in hostile territory. Residence, and not nationality, is the test (*f*).

Alien
enemies.

An alien enemy may be sued, and therefore he may defend and appeal from a judgment against him; but, except under licence from the Crown, he cannot sue in a British court. If his cause of action accrued before war it is suspended during war, but is not extinguished (*g*).

(*b*) *Parsons*, pp. 164, 165.

(*c*) *Bolognesi's Case* (1870), L. R. 5 Ch. 567.

(*d*) *Smith v. Johnson* (1858), 3 H. & N. 222; 27 L. J. Ex. 363.

(*e*) *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 369, 884.

(*f*) *Driefontein Consolidated Mines v. Janson*, (1902) A. C. at p. 505, H. L.; *Porter v. Freudenberg*, (1915) 1 K. B. 857, C. A. In other words, "local allegiance" is the test. But though Belgium was largely occupied by the enemy, the fact that a company was incorporated in Belgium did not make it an enemy company: *Société Anonyme Belge v. Anglo-Belgian Agency*, (1915) 2 Ch. 409, C. A. As to bills drawn by prisoners of war, see *Antoine v. Morshead* (1815), 6 Taunt. 237; cf. *Willison v. Patteson* (1817), 7 Taunt. at p. 449. As to a British company under enemy control, see *The Daimler Co. Case*, (1916) 2 A. C. H. L. 307.

(*g*) *Porter v. Freudenberg*, (1915) 1 K. B. 857, C. A., see at p. 873 as to suspension. An alien enemy cannot be the actor in any legal proceeding: cf. *Ex p. Marum* (1915), 84 L. J. K. B. 1893 (proof in bankruptcy). But as to *pro forma* joinder in partnership action, see *Rodriguez v. Speyer Bros.*, (1919) A. C. 59, H. L.

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When war breaks out all commerce with the enemy (except under licence from the Crown) becomes illegal, and every contract with the enemy, in so far as it is executory, is dissolved if its due fulfilment involves intercourse with the enemy (*h*). Thus, where a bill was drawn during war by an alien enemy on London, and was indorsed to an Englishman residing in hostile territory, it was held that it could not be enforced even after peace was concluded (*i*); and where a bill payable to drawer's order was drawn by a German firm, and accepted by an English firm before war, but was indorsed after war to an American firm with two alien enemy partners, the acceptor can refuse payment (*k*).

The common law rules may be extended or limited by statutes or proclamations relating to trade with the enemy: see, *e.g.*, the Trading with the Enemy Act, 1915 (5 & 6 Geo. 5, c. 98), which gave power to prohibit trading with persons of enemy nationality or enemy association, though not resident or carrying on business in enemy territory or enemy occupied territory.

Statutory Disabilities of Bankers.

Banker and
banking
company.

It is unlawful for a banker or banking company, other than the Bank of England—

- (a) To issue in England or Wales any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand (*l*).
- (b) To draw, accept, make, or issue in England or Wales any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand, or to borrow, owe, or take up any sum or sums of money on such bill or note (*m*).

Exception.—Banker or banking company lawfully issuing such bills or notes on May 6, 1844, but subject to certain conditions (*n*).

(*h*) *Zinc Corporation, Ltd. v. Hirsch*, (1916) 1 K. B. 541, C. A.; *Ertel, Bieber & Co. v. Rio Tinto Co.*, (1918) A. C. 260.

(*i*) *Willison v. Patteson* (1817), 7 Taunt. 439. As to licence to trade, see *Disconto Gesellschaft v. Brandt* (1915), 31 T. L. R. 586.

(*k*) *S. M. Weld v. Fruhling and Goschen* (1916), 32 T. L. R. 469.

(*l*) 7 & 8 Vict. c. 32, ss. 10 and 28 (Bank Charter Act, 1844), as explained by 17 & 18 Vict. c. 83, ss. 11 and 12.

(*m*) 7 & 8 Vict. c. 32, ss. 11 and 28, as explained by 17 & 18 Vict. c. 83, s. 11.

(*n*) *Ibid.*

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Previous statutes define the bankers who in 1844 were lawfully issuing such bills or notes. The result seems to be that in London and within a circle of three miles round, the Bank of England has a monopoly; that beyond three and within 65 miles, the monopoly is shared with banks of less than ten persons established before 1844; that beyond the 65 mile limit, the monopoly is shared with all banks established before 1844 who have not since lost their privileges (*o*). The statutes now in force affecting bills by conferring exclusive banking privileges on the Bank of England are: 39 & 40 Geo. 3, c. 28, s. 15; 7 Geo. 4, c. 46; 9 Geo. 4, c. 23; 3 & 4 Will. 4, c. 83, s. 2; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76, s. 5; 17 & 18 Vict. c. 83, ss. 11 and 12; 8 Edw. 7, c. 69, Sched. VI. Part 2. Their provisions seem inconsistent, but the later Acts do not expressly repeal the earlier ones, so the whole must be construed together. See sect. 97 (3) (c), *post*, saving the privileges of the Bank of England.

By sect. 251 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), a bank which is registered as a limited company is nevertheless liable without limit on its notes.

As to annual return of bankers showing names and addresses of partners, see sect. 21 of the Bank Charter Act, 1844 (7 & 8 Vict. c. 32).

As to the varying systems of note issue in England, Scotland and Ireland, see *Conant's Banks of Issue; Dictionary of Political Economy*, tit. Banks (United Kingdom).

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such (*p*);
Provided that

Signature
essential to
liability.

(1) Where a person signs a bill in a trade or

(*o*) *Lindley*, 8th ed. p. 115, n.

(*p*) Cf. *Fenn v. Harrison* (1790), 3 T. R. at p. 761; *Beckham v. Drake* (1841), 9 M. & W. at p. 92; *Re Adanson Co.* (1874), 47 L. J. Ch. at p. 734, per James, L.J.; New York Negotiable Instruments Law, § 37. For a statutory exception, see sect. 63 of the Companies (Consolidation) Act, 1908, *post*, p. 409.

§ 23.

assumed name, he is liable thereon as if he had signed it in his own name(*q*).

- (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm(*r*).

ILLUSTRATIONS.

1. A., who is agent for X., draws a bill in his own name. The payee knows that A. is only an agent. A. alone is liable as drawer of this bill. X. is not(*s*).

2. B. and X. are jointly indebted to C. B. alone makes a note in favour of C. for the amount of the debt. B. alone is liable on the note(*t*).

3. A. draws a bill, signing it "J. A., agent." A. alone is liable as drawer. His undisclosed principal is not(*u*).

4. D. is the holder of a bill indorsed in blank by C. D. converts C.'s indorsement in blank into a special indorsement to E., and transfers the bill to the latter. D. is not liable as indorser(*x*).

5. X., a partner in a firm who trade as "John Brown," makes a note for 100*l*. in respect of a partnership transaction, signing it as "Brown & Co." He has no authority from his partners to vary the firm style. The firm is not liable on this note, though X. individually is bound by it(*y*).

(*q*) Cf. *Lindus v. Bradwell* (1848), 5 C. B. at p. 591; *Trueman v. Loder* (1840), 11 A. & E. at p. 594. By sect. 2, "person" includes a body of persons, whether incorporated or not.

(*r*) *Pooley v. Driver* (1876), 5 Ch. D. 458; *Gurney v. Evans* (1858), 27 L. J. Ex. 166; cf. *R. v. Holden*, (1912) 1 K. B. 834, C. C. A.

(*s*) Cf. *Leadbitter v. Farrow* (1816), 5 M. & S. at p. 350; *Ex parte Rayner* (1868), 17 W. R. 64. Conversely a clerk who draws a bill in the name of a firm whose affairs he is winding up, two of the partners being dead, is not liable on the bill: *Wilson v. Barthrop* (1867), 2 M. & W. 863.

(*t*) *Siffkin v. Walker* (1809), 2 Camp. 308.

(*u*) *Pentz v. Stanton* (1833), 10 Wend. 271, New York.

(*x*) *Vincent v. Horlock* (1808), 1 Camp. 442.

(*y*) *Faith v. Richmond* (1840), 11 A. & E. 339; *Kirk v. Blurton* (1841), 9 M. & W. 284; *Lindley*, 5th ed. p. 185. If X.'s partners had authorized the change of style, the altered style would have been *pro hac vice* the firm style, and binding on them. The firm, too, is bound if the variation in style be immaterial and unintentional: *Forbes v. Marshall* (1855), 11 Exch. 166. As to an accidental misspelling, see *Leonard v. Wilson* (1834), 2 Cr. & M. 589; *Kirk v. Blurton* (1841), 9 M. & W. at p. 289. And if there be not a distinct firm style, it seems a partner may for firm purposes sign the individual

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6. A. is a partner in the firm of "B. & Co." A., in respect of a partnership transaction, draws a bill in his individual name on "B. & Co." It is refused acceptance. A. alone is liable as drawer; his co-partners are not (*z*).

7. John Smith carries on business under the name of "John Brown," or "Brown & Co.," or "The London Iron Company," John Smith is liable on a bill drawn, indorsed, or accepted by him in any of these names (*a*).

8. A principal trades and carries on a business in the name of one of his agents (a clerk). He is liable on a bill accepted by the clerk in his own name in respect of that business, although the clerk in accepting it acted contrary to his private instructions (*b*). So, too, a firm may trade under its own name in one place, and under the name of one of the partners in another place. His name then becomes the firm name (*c*).

9. J. B. carries on business in his own name, but having a dormant partner. If he accepts a bill on his private account, the dormant partner is not liable, but it lies on the dormant partner to show that the bill was not a firm bill (*d*).

By sect. 2, "person" includes a body of persons, whether incorporated or not. An exception to the rule laid down in this section is created by sect. 63 of the Companies (Consolidation) Act, 1908, *post*, p. 409, which is saved by sect. 97 (3). Any officer of the company who varies the style of the company is personally liable under that section.

By sect. 91, *post*, the signature may be written by the hand of an agent, but it must be the principal's signature, not the agent's. The seal of a corporation may be equivalent to a signature, sect. 91 (2), *post*.

Bills and notes form an exception to the ordinary rule that when a contract is made by an agent in his own name, evidence is admissible to charge the undisclosed principal, though not to discharge the agent. A person

names of his co-partners: *Norton v. Seymour* (1847), 16 L. J. C. P. 100.

(*z*) *Nicholson v. Ricketts* (1860), 29 L. J. Q. B. at p. 65; *Re Adanson & Co.* (1874), 43 L. J. Ch. 732, firm composed of four firms.

(*a*) Cf. *Wilde v. Keep* (1834), 6 C. & P. 235; *Forman v. Jacob* (1815), 1 Stark. 47; *Linäus v. Bradwell* (1848), 5 C. & B. at p. 591; and *Trueman v. Loder* (1840), 11 A. & E. at p. 594.

(*b*) *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97; cf. *Conro v. Port Henry Iron Co.* (1851), 12 Barb. 27, New York.

(*c*) Cf. *Alliance Bank v. Kearsley* (1871), L. R. 6 C. P. at p. 438, Willes, J.

(*d*) *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A., discussing the previous cases.

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who has not signed, though not liable on the instrument, may of course be liable on the consideration: *e.g.*, X. would be so liable in Illustration 2. The distinction is this: In the one case the liability is transferable; in the other it is not; also the *onus probandi* is shifted.

Partners.

The signature of a firm is deemed to be the signature of all persons who are partners in the firm, whether working, dormant, or secret (*e*), or who, by holding themselves out as partners, are liable as such to third parties (*f*).

Where the name of a firm and the name of one of the partners in it is the same, and that partner draws, indorses, or accepts a bill in the common name, the signature is *primâ facie* deemed to be the signature of the firm: but the presumption may be rebutted by showing that the bill was not given for partnership purposes or under the authority of the firm (*g*).

It was formerly thought that where two distinct firms, having one or more partners in common, carried on business under the same name, each firm was liable on the acceptances of the other to a holder for value without notice. But since the case of *Yorkshire Banking Co. v. Beatson*, it seems clear that this hard rule is no longer law (*h*).

The case of a non-trading firm illustrates the distinction between capacity and authority. The partners in a non-trading firm have full capacity to bind themselves by indorsing or accepting bills; but though the capacity is present, there is no presumption that the partner who signs the firm name, or the names of his co-partners, has any authority to bind his co-partners by so doing. The partner who signs is, of course, bound, and so are his co-partners if they have authorized his act, or if they subsequently ratify it, but not otherwise. The law on this point may, perhaps, be summed up as follows:—

Trading firm.

A partner in a trading firm has *primâ facie* authority to

(*e*) *Pooley v. Driver* (1876), 5 Ch. D. 458; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4. Sect. 6 of that Act, which deals with authority to bind a firm, expressly saves any general rule of law relating to negotiable instruments.

(*f*) *Gurney v. Evans* (1858), 27 L. J. Ex. 166; Partnership Act, 1890, s. 14. By the Limited Partnership Act, 1907 (7 Edw. 7, c. 24), the liability of a limited partner is restricted to the amount of his share in the firm.

(*g*) *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A.

(*h*) *Ibid.*; and *Lindley*, 8th ed. p. 226.

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bind the firm by drawing, indorsing, or accepting bills in the firm name for partnership purposes; and if the bill get into the hands of a holder in due course, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not (*i*). Thus:—

1. X., a partner in a trading firm, makes a note in the firm's name, payable to C., and gives it to him in payment of a private debt. It lies on C. to show that X. had authority from his co-partners so to do (*k*).

2. A. draws two bills on a trading firm in respect of one and the same debt. By mistake both bills are accepted. The bills are negotiated to holders in due course. The firm is liable on both bills (*l*).

3. A partner accepts in the firm name a bill drawn on the firm in respect of a debt partly due from the firm and partly due from himself alone. Fraud is negatived, but the holder knows the facts. The *pro tanto* liability of the firm on the instrument is doubtful (*m*).

In case 3, the safe plan is to sue on the consideration. This rule and the next are merely deductions from the general rule that a partner has implied authority to do any act necessarily incidental to the proper conduct of the partnership business, and that there the presumption of authority ends.

There is a quasi-exception to the general rule where the name of the firm is the same as the name of one of the partners in it. In that case an acceptance in the common name, written by the partner whose name it is, may be shown to be his individual acceptance and not binding on the firm (*n*).

A partner in a non-trading partnership has *primâ facie* no authority to render his co-partners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible (*o*). Non-trading firm.

Partnerships, such as professional partnerships (*e.g.*,

(*i*) *Bank of Australasia v. Breillat* (1847), 6 Moore, P. C. 152, at p. 194; *Wiseman v. Easton* (1863), 8 L. T. N. S. 637; cf. sect. 5 of the Partnership Act, 1890.

(*k*) Cf. *Levieson v. Lane* (1862), 32 L. J. C. P. 10.

(*l*) *Davison v. Robertson* (1815), 3 Dow, 218, H. L.

(*m*) *Ellston v. Deacon* (1866), L. R. 2 C. P. at p. 21.

(*n*) *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A.

(*o*) *Dickinson v. Walpy* (1829), 10 B. & C. at p. 137; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425.

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solicitors) (*p*), mining partnerships (*q*), agricultural partnerships (*r*), commission agencies (*s*), and cinema proprietors (*ss*), have been held non-trading: and auctioneers, perhaps, are non-traders (*t*): but banking is a trading partnership (*u*).

In America, physicians, tavern-keepers, tunnel-workers, and farmers have been held non-traders (*x*). In *Harris v. Amery* (*y*), Willes, J., points out that the term "trade" is not co-extensive with the term "business." It does not seem to be decided how far the rule applies to cheques, as well as to bills and notes. The question cannot often arise, because opening an account in the firm name is evidence of actual authority. Note that authority to draw cheques is not evidence of authority to draw bills, and a post-dated cheque is a bill (*z*).

Power of partner to transfer.

Where a bill is payable to the order of a firm, a partner who cannot by his indorsement render his co-partners liable, may transfer the property therein by negotiating it in the firm name (*a*). Thus:—

1. Bill specially indorsed to a non-trading partnership. One of the partners, without communicating with his co-partners, indorses it away for a firm debt. The property in the bill passes to the indorsee (*b*).

2. Bill specially indorsed to a firm under a wrong style (*e.g.*, to "Smith, Brown, & Co.," whereas the proper style is "Brown & Co."). One of the partners indorses it away, using, without the assent of the rest, the wrong style. The firm is not liable on the indorsement, but the property in the bill passes to the indorsee (*c*).

When a bill payable to the order of a firm is indorsed by a partner in the firm name, in fraud of his co-partners,

(*p*) *Garland v. Jacomb* (1873), L. R. 8 Ex. at p. 219.

(*q*) *Ricketts v. Bennett* (1847), 4 C. B. at p. 699.

(*r*) *Kimbro v. Bullit* (1859), 20 Howard, 256.

(*s*) *Yates v. Dalton* (1858), 28 L. J. Ex. 69.

(*ss*) *Higgins v. Beauchamp*, (1914) 3 K. B. 1192.

(*t*) *Wheatley v. Smithers*, (1906) 2 K. B. 321; affirmed on a different ground, viz., authority in fact, *ibid.*, (1907) 2 K. B. 684, C. A.

(*u*) *Bank of Australasia v. Breillat* (1847), 6 Moore, P. C. 152, at p. 194.

(*x*) *Parsons on Partnership*, 2nd ed. p. 99, *n*.

(*y*) *Harris v. Amery* (1865), L. R. 1 C. P. at p. 154.

(*z*) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

(*a*) *Lindley*, 8th ed. p. 166; cf. *Pollock*, 8th ed. p. 34.

(*b*) Cf. *Smith v. Johnson* (1858), 3 H. & N. 222; 27 L. J. Ex. 363.

(*c*) *Williamson v. Johnson* (1823), 1 B. & C. 146; *Kirk v. Blurton* (1841), 9 M. & W. at p. 287.

the property therein does not pass to an indorsee with notice, but there seem to be technical difficulties in the way of an action for conversion brought by the firm (*d*). In such case the proper course, perhaps, is to give notice to the acceptor not to pay. He could defend an action against a holder with notice. If the bill has been paid, an action lies for money had and received (*e*).

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When a bill is payable to the order of a firm and the partnership is subsequently dissolved, the indorsement of an ex-partner in the late firm name transfers the property therein and authorizes the payment thereof (*f*). Ex-partners.

Lewis v. Reilly (*g*), decided in 1841, may be open to question, in so far as it lays down that an ex-partner, by indorsing a bill in the late firm name, renders his former partners liable as indorsers to a holder with notice of the dissolution (*h*). The question now turns on the true construction to be put on sect. 38 of the Partnership Act, 1890 (53 & 54 Vict. c. 39). Where a partner retires from his firm, but the business is carried on, he may still be liable on the firm's bills if he has not given proper notice of his retirement. His liability rests on the doctrine of "holding out" which is now embodied in sect. 14 of that Act (*i*).

24. Subject to the provisions of this Act (*k*), where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge

Forged or
unauthorized
signature

(*d*) *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478, Ex. Ch.

(*e*) *Ibid*.

(*f*) *King v. Smith* (1829), 4 C. & P. 108; *Lewis v. Reilly* (1841), 1 Q. B. 349.

(*g*) *Lewis v. Reilly* (1841), 1 Q. B. 349.

(*h*) *Kilgour v. Finlyson* (1789), 1 H. Bl. 155; *Abel v. Sutton* (1800), 3 Esp. 108; *Anderson v. Weston* (1840), 6 Bing. N. C. 296. See *passim* *Odell v. Cormack* (1887), 19 Q. B. D. 223, as to dissolution.

(*i*) *Lindley on Partnership*, ed. 8, pp. 79, 80; and cf. *Ex p. Central Bank of London*, (1892) 2 Q. B. 633, C. A., which arose before the Act.

(*k*) For the provisions referred to, see sect. 54 (2); sect. 55 (2), as to estoppels; and sects. 60, 80, and 82, protection to bankers paying demand drafts, or collecting crossed cheques. See sect. 7 (3), as to fictitious payees; and sect. 25, as to procuration signatures.

§ 24. therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (*l*).

Forgery, &c.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

ILLUSTRATIONS.

1. A bill is payable to the order of John Smith. Another person of the same name gets hold of it, and indorses it to D., who takes it as a holder in due course. D. acquires no title to the bill, he cannot enforce payment against any party thereto (*m*), and should any party pay him, the payment is invalid (*n*).

2. A note payable to order is stolen from the payee. The thief forges the payee's indorsement, and collects the note from the maker's banker, who returns the note to the maker. The payee can recover the amount of the note from the maker in an action for conversion of the note (*o*).

3. A bill is payable to C.'s order. His indorsement is forged. D., a subsequent holder, presents the bill for acceptance. The drawee accepts it payable at his bankers. The bankers pay D. They cannot debit the acceptor with this payment (*p*).

4. A bill purporting to be drawn by A. to the order of C. & Co., and to be indorsed by them, is accepted by the drawee payable at his bankers, and at maturity is paid by them. A. is a customer of the acceptor's, who often drew bills payable to C. & Co. It turns out afterwards that the drawer's and payee's names and signatures were forged by a clerk of the acceptor's, who stole the proceeds of the bills. The bank can debit the acceptor's account with this payment, for the bill never having been payable to the real C. & Co., the payees were fictitious persons and the bill was payable to bearer under sect. 7 (3) (*q*).

(*l*) Cf. New York Negotiable Instruments Law, § 42, and cases cited in *Crawford's* edition. As to "preclusion" or estoppel, see *post*, p. 85.

(*m*) *Mead v. Young* (1790), 4 T. R. 28.

(*n*) *Graves v. American Bank* (1858), 17 New York R. 205; cf. *Ogden v. Benas* (1874), L. R. 9 C. P. 513.

(*o*) *Johnson v. Windle* (1836), 3 Bing. N. C. 225.

(*p*) *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

(*q*) *Bank of England v. Vagliano*, (1891) A. C. 107, H. L.; reversing *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243, C. A.

5. A bill is payable to the order of a firm. X., one of the partners, fraudulently indorses it in the firm name to D. in payment of a private debt. The acceptor pays D. X. becomes bankrupt. X.'s co-partners and trustee can recover from D. the money he received on the bill (r). § 24.
Forger, &c.

6. C. specially indorses a bill to D. It is stolen before delivery to D., and D.'s indorsement in blank is forged on it. It comes into X.'s hands, and he gets his bankers to present it for payment. They receive payment, and credit X. with the amount. X. subsequently draws out the whole sum. C. can recover the amount of the bill from the bankers (s).

7. Note for 100*l*. X. forges B.'s signature to it as maker. Before the note matures the holder finds out that B.'s signature is a forgery, and threatens to prosecute X. In order to prevent this, B. gives the holder a memorandum, which says, "I hold myself responsible for the note for 100*l*. bearing my signature." The ratification is invalid. B. is not liable on the note (t).

8. A. draws a bill payable to C.'s order. As between A. and C. the consideration is fraudulent. X. forges C.'s indorsement, and negotiates the bill to D., who takes it in good faith. D. finds out that C.'s indorsement has been forged, and after the bill is due he obtains a genuine indorsement from C., giving him half the value of the bill. D. cannot sue A. (u).

9. B.'s acceptance to a bill is forged. A holder who takes it *bonâ fide* is afterwards informed that the signature is not B.'s, and accordingly writes to inquire. B. writes back to say the signature is his. B. is liable on this acceptance (x).

10. X., a partner in a trading firm, fraudulently accepts a bill in the firm name for a private debt of his own. It is negotiated to a holder for value without notice. The firm is estopped from setting up X.'s fraud (y).

11. The acceptor of a bill forges A.'s name thereon as drawer, then discounts it with a bank. The bill is dishonoured, and notice sent to A. The acceptor gets the bill renewed for a smaller sum, paying the difference in cash to the bank, and on the renewal again forges A.'s name as drawer. The renewed bill is dishonoured, and notice sent to A. A. does not repudiate the transaction for fourteen days after receipt of the first notice.

See note, *ante*, p. 24, and contrast *N. and S. Wales Bank v. Macbeth*, (1908) A. C. 137.

(r) *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478, Ex. Ch.

(s) *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; cf. *Charles v. Blackwell* (1877), 2 C. P. D. at p. 157, and cases cited under § 82.

(t) *Brook v. Hook* (1871), L. R. 6 Ex. 89; *Ex parte Edwards* (1841), 2 Mon. D. & D. 241; and cf. *Williams v. Bayley* (1866), L. R. 1 H. L. 200, at p. 221.

(u) *Esdaile v. La Nauze* (1835), 1 Y. & C. 394.

(x) *Brook v. Hook* (1871), L. R. 6 Ex. at p. 100; *Wilkinson v. Stoney* (1839), 1 J. & S. 503; *Roberts v. Tucker* (1851), 16 Q. B. at p. 577.

(y) *Hogg v. Skeen* (1865), 18 C. B. N. S. at p. 432; 34 L. J. C. P. at p. 155, Willes, J.

§ 24. He is not estopped from setting up that his signature was forged (z).

Forgery, &c.

12. X. forges B.'s acceptance. B. pays the holder. Afterwards X. again forges B.'s acceptance, which, unknown to B., gets into the hands of the same holder. B. may set up that his signature was forged (a).

13. X. forges B.'s acceptance, and, in consideration of B.'s paying it, gives him a bill of sale. A seizure under this bill of sale cannot be set aside by X.'s trustee in bankruptcy (b).

14. A letter of credit on a bank is granted in favour of C., whose clerk gets possession of it, forges C.'s name to a draft, and obtains the money. The bank is not discharged by this payment (c).

15. X. steals an uncrossed cheque payable to C., his employer, forges his employer's indorsement, and pays the cheque into his own bank. The bank credit X.'s account with the amount of the cheque, cross the cheque for collection, and collect it. This is a conversion of the cheque for which the bank is liable to C., the true owner (d).

16. A cheque is drawn in Roumania on London in favour of C. & Co., who indorse it to their agents, D. & Co. The cheque is stolen and D. & Co.'s indorsement is forged. The cheque is cashed by a Vienna bank and forwarded to a London bank, who collect the amount. By Austrian law the Vienna bank, who acted honestly and without negligence, acquired a good title. The London bank is not liable to C. & Co. for the conversion of the cheque (e).

17. X. by fraud induces A. to draw a cheque in favour of C. X. then forges C.'s indorsement and pays the cheque in to his own bankers, who collect the amount. The bankers are liable to A. for converting the cheque, and it is immaterial that A. may be indebted to X. on another transaction. The bankers cannot set off the debt due to the forger (f).

(z) *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82, H. L., followed *British Linen Co. v. Cowan* (1906), 8 F. 704 (Scotland); cf. *Ogilvie v. West Australian Mortgage Corp.*, (1896) A. C. 257, 268, P. C. *Aliter*, if the bank's position had in the meantime been altered prejudicially: *ibid.*; and see *William Ewing & Co. v. Dominion Bank*, (1904) A. C. 806, 807, P. C., where leave to appeal was refused. The case is reported in full, 35 Canada Sup. Court Reports, p. 133.

(a) *Morris v. Bethell* (1869), L. R. 5 C. P. 47.

(b) *Ex parte Caldecott, Re Maplebeck* (1876), 4 Ch. D. 150, C. A.

(c) *Orr v. Union Bank* (1854), 1 Macq. H. L. 513.

(d) *Gordon v. Capital and Counties Bank*, (1902) 1 K. B. 242, C. A.; affirmed, H. L., (1903) A. C. 240.

(e) *Embiricos v. Anglo-Austrian Bank*, (1904) 2 K. B. 870; affirmed, (1905) 1 K. B. 677, C. A. See note, *post*, p. 278. *Ques.* if the cheque was stopped would the drawer be liable to a person who held *bond fide* under the forged indorsement? Probably he would be liable.

(f) *North and South Wales Bank v. Macbeth*, (1908) A. C. 137, H. L. (*Irvine's Case*).

By sect. 60, *post*, a banker who pays a demand draft drawn on him and held under a forged indorsement is protected, and so is a banker who collects a crossed cheque for his customer (see sect. 82, *post*). For further illustrations see also note on recovery of money paid by mistake, *post*, p. 235, and sect. 7 (3), *ante*, as to fictitious payees.

§ 24.

Illustration 7 shows that a forgery cannot be ratified, and the language of the Act seems to countenance this view. A forger does not act, and does not purport to act, on behalf of the person whose name he forges. There is, therefore, nothing on which ratification can be grounded. In a Scotch appeal before the Act, Lord Blackburn says that a forgery may be ratified (*g*), but the English cases were not cited, and the decision turned on the ground that the facts had not created an estoppel. "A document cannot be a forged instrument as between certain persons and not as between others" (*h*), but one person may be estopped from setting up the forgery while another may not.

Ratification.

The word "precluded" was inserted in committee in lieu of the word "estopped," an English technical term, unknown to Scottish law. Though a forgery cannot be ratified, yet a person whose signature has been forged may by his conduct be estopped from denying its genuineness to an innocent holder (Illustration 9); and, again, a party to a bill may be estopped by his conduct (*i*), or in certain cases by the fact of becoming a party (*k*), from setting up that the signatures of other parties thereto are forged or unauthorized. When an estoppel by negligence is relied on, it must be shown that the negligence was the direct and proximate cause of the forgery being taken as genuine (*i*). It must be the *causa causans*, and not merely

Estoppels.

(*g*) *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. at p. 99, H. L.

(*h*) *Morison v. London County & Westminster Bank*, (1914) 3 K. B. at p. 374, C. A.

(*i*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; *Patent Safety Gun Cotton Co. v. Wilson* (1880), 42 L. J. C. P. 713, C. A.

(*k*) As to drawer, see sect. 55 (1); maker of note, sect. 88 (2); indorser, sect. 55 (2); acceptor, sect. 54; acceptor for honour, sect. 66, note; fictitious payee, sect. 7 (3); fictitious drawee, sect. 5 (2).

(*l*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; cf. *Leaves Sanitary Laundry Co. v. Barclay, Bevan & Co.* (1906), 11 Com. Cas. 255, at p. 267; *Smith v. Prosser*, (1907) 2 K. B. at p. 746, C. A.; *Kepitigalla Rubber Estates v. National Bank of India*, (1909) 2 K. B.

§ 24.

the *causa sine qua non*. There was formerly ground for contending that when a married woman's indorsement was forged by her husband, the property in the bill passed to a holder in due course (*m*); but since the Married Women's Property Act and this Act, it is conceived that this contention could no longer be maintained.

Injunction,
&c.

Where a bill is held under a forged signature, the Court can restrain its negotiation by injunction, or order it to be given up and cancelled (*n*).

Fraudulent
alteration.

A bill held under a forged signature must be distinguished from a bill with genuine signatures which has been fraudulently altered, though such alteration may amount to the crime of forgery: see sect. 64, *post*.

Foreign laws.

Under the continental codes the payor is not bound to verify the genuineness of the indorsements, and in some countries a *bonâ fide* holder for value can make a good title through a forged indorsement.

Illustration 16 shows that this section must be read subject to the rules of international law, and that the transfer of a chattel must be governed by the law of the place of transfer.

As Williams, L.J., says: "The rule that the transfer of chattels must be governed by the law of the country where the transfer takes place applies to a bill or cheque" (*o*).

Criminal law.

Forgery of a bank-note is punishable with penal servitude for life, and forgery of any other bill or note is punishable with fourteen years' penal servitude; see sect. 2 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27); and for definition of forgery, see sect. 1 of that Act (*p*).

Procurator
signatures.

25. A signature by procurator operates as notice that the agent has but a limited authority

at p. 1022; *London Joint Stock Bank v. Macmillan*, (1918) A. C. 777; 23 Com. Cas. 415, H. L., reviewing the previous cases.

(*m*) *Dawson v. Prince* (1858), 27 L. J. Ch. 169, L.J.J.

(*n*) *Esdaile v. La Nauze* (1835), 1 Y. & C. 394; *Seton on Decrees*, ed. 7, p. 712.

(*o*) *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. at p. 683, C. A.

(*p*) Cf. *R. v. Holden*, (1912) 1 K. B. 483, discussed *Morison v. London County and Westminster Bank*, (1914) 3 K. B. at p. 381, C. A. (partner signing firm name without authority); *R. v. Rogers* (1838), 8 C. & P. 629 (John Smith signing as "John Smith & Co.," there being no such firm).

to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (*q*). § 25.

ILLUSTRATIONS.

1. B., who carries on business for himself, and is also in partnership with S., goes abroad; he gives S. an authority to accept bills in his name in respect of his private business. S. accepts a bill in B.'s name in respect to the partnership business, signing it "per pro." The bill is negotiated. B. is not liable on this acceptance (*r*).

2. By a resolution of the directors, the chairman of a company is authorized to accept bills drawn by A. against the deposit of securities. He accepts a bill drawn by A., signing per pro. the company, without requiring the deposit of security. The bill is negotiated to a *bonâ fide* holder. The company is liable (*s*).

3. A cheque payable to order is indorsed "per pro." without the authority of the payee. If the bankers pay it, the payment is protected by statute, and is valid (*t*).

4. The manager in South America of an English limited company, in order to obtain a guarantee for the company's business, gives a note signed "for myself and in representation of the company." This not being necessary, or in the ordinary course of the company's business, the company is not liable (*u*).

5. Detinue for a Government of India note payable to order. The note was payable to the plaintiff's order, and was indorsed in the form "D., by his attorney, X.," in pledge for a private debt of the agent's, though this was not known to the indorsee. The right of the indorsee to retain the note depends on the proper construction of the power of attorney held by X., and in construing it, it will be held that a power to sell does not include a power to pledge (*x*).

(*q*) New York Negotiable Instruments Law, § 40; cf. *Paget* on Banking, ed. 2, p. 258, as to collecting bankers.

(*r*) *Attwood v. Munnings* (1827), 7 B. & C. 278; *Stagg v. Elliott* (1862), 12 C. B. N. S. 373; 31 L. J. C. P. 260. Cf. *Jacobs v. Morris*, (1902) 1 Ch. 816, C. A., as to restraining negotiation of bill accepted by agent in excess of his authority.

(*s*) *Re Land Credit Co.* (1869), L. R. 4 Ch. 460; and cf. *Ex parte Meredith* (1863), 32 L. J. Ch. 300; *Jacobs v. Morris*, (1902) 1 Ch. 816 (construction of power).

(*t*) *Charles v. Blackwell* (1877), 2 C. P. D. at pp. 159, 160, C. A., decided on 16 & 17 Vict. c. 59, s. 19. See, now, sect. 60, *post*. The cheque was signed "C. & Co. per S. K. agent," but it was assumed in the judgments that this was the equivalent of "per pro." signature.

(*u*) *Re Cunningham & Co., Limited* (1887), 36 Ch. D. 532.

(*x*) *Jonmenjoy v. Watson* (1884), 9 App. Cas. 561, P. C., distinguishing *Bank of Bengal v. Macleod* (1852), 7 Moore, P. C. 35; cf. *Bryant v. Banque du Peuple*, (1893) A. C. 170, P. C. If the agent is acting within his authority, the fact that he has abused it

§ 25.

6. A clerk is authorized to draw cheques "per pro." for his employer's business. He draws a cheque per pro. his employer, making it payable to a bookmaker for his private betting losses. The bookmaker gets the cheque cashed. The employer can recover the money from the bookmaker (*y*).

7. An agent draws a cheque "per pro." in excess of his authority. The drawer is not liable on this cheque to a person who has cashed it in good faith, but he must account for any money which has come into his possession (*z*).

This section is declaratory. It relates only to liabilities on the instrument itself, and does not apply to the proceeds of a bill which has been paid or discharged. It cannot therefore be read into sect. 82, which protects a banker collecting crossed cheques (*a*).

If Smith & Co. give their manager, John Brown, authority to sign for them "per pro.," the usual form of signature is "p.p. Smith & Co., John Brown."

There is perhaps a disposition to narrow the rule in the case of corporations (*b*). In an Irish case (*c*) a distinction is drawn between an acceptance signed "p.p. J. B., T. S.," and one signed "For J. B., T. S." The distinction does not seem founded on any clear principle. The case can be supported on other grounds.

In *Attwood v. Munnings* (*d*), Bayley, J., says: "This was an action on an acceptance importing to be by procuration, and therefore any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act for him in pursuance of an authority from him. A person taking such a bill ought to exercise due caution, and it would be only reasonable prudence to require the production of that authority."

Liability of
agent signing

A person who, without authority, signs the name of

does not affect a holder without notice. As to action for conversion when agent has indorsed "per pro." in fraud of his authority, see *Gompertz v. Cook* (1903), 20 Times L. R. 106.

(*y*) *Morison v. Kemp* (1912), 29 T. L. R. 70.

(*z*) *Reid v. Rigby*, (1894) 2 Q. B. 40.

(*a*) *Morison v. London County & Westminster Bank*, (1914) 3 K. B. 356, C. A.; cf. *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A. (paying banker).

(*b*) *Re Land Credit Co.* (1869), L. R. 4 Ch. 460, at p. 468.

(*c*) *O'Reilly v. Richardson* (1865), 17 Ir. Com. L. R. 74; but cf. *Balfour v. Ernest* (1859), 28 L. J. C. P. at p. 176; *Ulster Bank v. Synnott* (1871), 5 Ir. R. Ch. at p. 612; *Employers Liability Assn. v. Skipper* (1887), 4 T. L. R. 55.

(*d*) *Attwood v. Munnings*, 7 B. & C. 278, at p. 283.

another person to a bill, either simply or by a procuration signature, is not (except in the special case provided for by sect. 63 of the Companies Act, 1908, *post*, p. 410) liable on the instrument (*e*); but if the alleged principal be a fictitious or non-existing person, the signer is liable on the instrument (*f*). Thus:—

§ 25.

without
authority.

1. A bill drawn on B. is held by C. X., without authority, accepts it for B., signing per pro. X. is not liable as acceptor, though he may be liable to C. or a subsequent holder in an action for a false representation or breach of warranty of authority (*g*).

2. Two directors of a limited company, which has no power to accept bills, accept a bill "per pro." the company. They may be personally liable in an action for false representations (*h*).

In an action for false representation, under such circumstances, it lies on the holder to prove damage (*i*). The modern tendency is to restrict liability *ex delicto* to cases of intentional fraud. To sign the name of another person to a bill "per pro." without authority and with intent to defraud was not a forgery at common law, but it was made felony by statute (*k*). But if there is authority, the fraudulent misuse of that authority does not, it seems, amount to forgery (*l*).

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him

Persons
signing as
agent or in
representative
capacity.

(*e*) *Polhill v. Walter* (1832), 3 B. & Ad. 114.

(*f*) Cf. *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; and see sect. 23 (1).

(*g*) *Polhill v. Walter* (1832), 3 B. & Ad. 114. He is also liable as impliedly warranting his authority. See *Starkey v. Bank of England*, (1903) A. C. 114, H. L.

(*h*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A., see at p. 362.

(*i*) *Eastwood v. Bain* (1858), 3 H. & N. 738; 28 L. J. Ex. 74.

(*k*) The Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 24. See now sect. 1 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

(*l*) *Morison v. London County & Westminster Bank*, (1914) 3 K. B. at p. 380, C. A.

§ 26. as an agent, or as filling a representative character, does not exempt him from personal liability (*m*).

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

ILLUSTRATIONS.

1. Money is lent to a parish. The churchwardens give a note for the amount, signing it "J. B. and H. S., churchwardens." They are personally liable on the note as makers (*n*).

2. B. by will directs his executor to carry on his business. The executor does so, and, in the course of the business, accepts bills, signing them "J. S., executor of B." He is personally liable on these acceptances (*o*).

3. D., the holder of a bill payable to his order, dies. X., his executor, indorses the bill away, signing the indorsement "J. X., executor of D." X. is personally liable on this indorsement, unless he add some such words as "without recourse against me personally" (*p*). *Quære*, since the Act?

4. Money is lent to the X. Company. A note for the amount is given in the form, "We promise to pay, *et cet.*" (Signed),

"J. B., } Directors of the X. Company, Limited.
"J. S., }
"J. T., Manager."

The persons who sign are personally liable as makers (*q*).

5. Money is lent to the X. Railway Company. A note for the amount is given in the form, "I promise to pay, *et cet.*" (Signed), "for the X. Railway Co. J. B., Secretary." J. B. is not personally liable (*r*).

6. Note in the form, "We, the directors of the X. Company, Limited, *et cet.*" (signed by the directors), "J. B., J. S." In the corner of the note is the seal of the company, and the signature of an attesting witness. J. B. and J. S. are personally liable (*s*).

(*m*) See a somewhat different rule laid down by § 30 of the New York Negotiable Instruments Law.

(*n*) *Rew v. Pettet* (1834), 1 A. & E. 196.

(*o*) *Liverpool Bank v. Walker* (1859), 4 De G. & J. 24.

(*p*) Cf. *Childs v. Monins* (1821), 2 Brod. & B. 460.

(*q*) *Courtauld v. Sanders* (1867), 16 L. T. N. S. 562.

(*r*) *Alexander v. Sizer* (1869), L. R. 4 Ex. 102; but see *Gray v. Raper* (1866), L. R. 1 C. P. 694.

(*s*) *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361; *Tandes v. Bradwell* (1909), 25 T. L. R. 478.

7. Bill specially indorsed to "C., agent." He indorses it away, signing "C., agent." C. is personally liable as indorser (*t*).

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8. A note running "We, the undersigned, in the name and on behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," is signed by three persons. They are personally liable on this note (*u*).

9. Promissory note given for 300*l.* lent to a limited company, and signed, "J. S., managing director." Above his signature is stamped the name of the company, namely, "The J. S. Laundry, Ltd." This is the note of the company, and J. S. is not personally liable (*x*).

This section was re-drafted in committee, and perhaps somewhat modifies the rigour of the common law rule. At any rate the older cases must be examined carefully with the words of the section. The principle as this, the terms agent, manager, &c. attached to a signature are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal. "Is it not a universal rule," says Lord Ellenborough, "that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe' he is liable" (*y*). Cf. sect. 23, *ante*. It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal. The maxim *ut res magis valeat* governs the construction. As to liability of agent signing his principal's name without authority, see note to last section (*z*). By sect. 31 (5), *post*, a representative who is compelled to indorse may indorse in such terms as to negative personal liability.

The case of an executor or administrator often gives rise to difficulty. Where an executor merely winds up a transaction commenced by the testator, it is right that he should be able to protect himself from personal liability, but where he carries on the business and engages in fresh

Executors,
&c.

(*t*) *Bartlett v. Hawley* (1876), 120 Mass. 92.

(*u*) *M'Meekin v. Euston* (1889), 11 Sess. Cas. 363.

(*x*) *Chapman v. Smethurst*, (1909) 1 K. B. 927, C. A.

(*y*) *Leadbitter v. Farrow* (1816), 5 M. & S. at p. 349.

(*z*) Apart from any question of fraud, he impliedly warrants his authority, *Starkey v. Bank of England*, (1903) A. C. 114, H. L.

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transactions, it is clear that the fact that he is an executor will not enable him to carry it on as a limited liability concern.

Master of
ship.

The master of a ship who draws a bill on his owners for the price of necessities supplied to the ship is personally liable on the bill, although he states in the bill that it is "for value received in coal . . . for which I hold my vessel owners and freight responsible" (a).

(a) *The Elmville*, (1904) P. 319. And see the course of business in drawing for necessities described, *The Ripon City*, (1897) P. 225, at p. 231.

The Consideration for a Bill.

27. (1) Valuable consideration for a bill may Value defined.
be constituted by,—

- (a) Any consideration sufficient to support a simple contract (b);

ILLUSTRATIONS.

1. A cross acceptance (c), the forbearance of the debt of a third person (d), the compromise of a disputed liability (e), a promise to give up a bill thought to be invalid (f), a debt barred by the Statute of Limitations (g), the duty on the part of a thief to restore stolen property (h), or the withdrawal of a letter to a club committee complaining that acceptor has not paid a gaming debt (i), constitute value.

2. A mere moral obligation (k), a debt represented to be due

(b) As to consideration in law generally, see notes to *Lampleigh v. Braithwaite*, 1 Smith, L. C., ed. 12, p. 159.

(c) *Rose v. Sims* (1830), 1 B. & Ad. at p. 526; cf. *Burdon v. Benton* (1847), 9 Q. B. 843; *Hornblower v. Proud* (1819), 2 B. & Ald. 327; *Rice v. Grange* (1892), 131 New York R. 149 (exchange of promissory notes). As to proof on cross-acceptances, see *Ex parte Cama* (1874), L. R. 9 Ch. 687, and *Williams' Bankruptcy*, ed. 11, p. 157.

(d) *Balfour v. Sea Assur. Co.* (1857), 3 C. B. N. S. 300; 27 L. J. C. P. 17; *Crears v. Hunter* (1887), 19 Q. B. D. 341, C. A. (forbearance in fact, without binding agreement to forbear); cf. *Elkington v. Cooke Hill* (1914), 30 T. L. R. 670 (forbearance to enforce note pending currency of post-dated cheque).

(e) *Cook v. Wright* (1861), 30 L. J. Q. B. 321.

(f) *Smith v. Smith* (1863), 13 C. B. N. S. 418; 32 L. J. C. P. 149.

(g) *Latouche v. Latouche* (1865), 3 H. & C. at p. 576; 34 L. J. Ex. 85; cf. *Wild v. Tucker*, (1914) 3 K. B. 36 (debt provable in bankruptcy).

(h) *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 535, C. A.; cf. *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, at p. 297 (conversion of other securities).

(i) *Ex p. Martingell, Re Browne*, (1904) 2 K. B. 133; cf. *Hyams v. Stuart King*, (1908) 2 K. B. 696, C. A.

(k) *Eastwood v. Kenyon* (1840), 11 A. & E. 438; cf. *Flight v. Reed* (1863), 32 L. J. Ex. 265; cf. *White v. Bluett* (1853), 23 L. J. Ex. 36, as to attempting to discharge a note for a loan by a promise which was *nudum pactum*; *Re Whitaker* (1889), 42 Ch. D. 119, C. A. (proof against lunatic's estate on voluntary note).

§ 27. though not really due (*l*), the giving up a void note (*m*), or a voluntary gift of money (*n*), do not constitute value.

(*b*) An antecedent debt (*o*) or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time (*p*).

ILLUSTRATION.

A customer, being indebted to his bankers, gets a cheque on another bank from a friend, for the purpose of reducing his overdraft. The cheque is paid in and credited to his account. The bankers hold that cheque for value, and can recover from the drawer if he stops it (*q*).

The words "or liability" were added in committee. They perhaps extend the previous law. By sect. 2, *ante*, "value" means valuable consideration, *i.e.*, as defined by this section.

Valuable consideration has been defined as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*r*).

This section, it seems, does not affect the principle of Scottish law "that valuable consideration is not necessary

(*l*) *Southall v. Rigg* (1851), 11 C. B. 481. And in *Stott v. Fairlamb* (1883), 52 L. J. Q. B. 420, Denman, J., seems to have held an agreement to pay a debt within three years is no consideration for giving a note payable on demand. See, too, *Bell v. Gardiner* (1842), 4 M. & Gr. 11, note given in satisfaction of bill not known to have been altered. As to renewal of note made without consideration, which stands on the same footing as the original, see *Edwards v. Chancellor* (1888), 52 J. P. 454.

(*m*) *Coward v. Hughes* (1855), 1 K. & J. 443; but cf. *Mather v. Maidstone* (1856), 18 C. B. 273; 25 L. J. C. P. 310, where an estoppel intervened.

(*n*) *Hill v. Wilson* (1873), L. R. 8 Ch. at p. 894.

(*o*) *Poirier v. Morris* (1853), 2 E. & B. 89; *Swift v. Tyson* (1842), 15 Pet. 1 Sup. Ct. U. S., Story, J.; cf. *Butcher v. Stead* (1875), L. R. 7 H. L. 839; New York Negotiable Instruments Law, § 51.

(*p*) *Currie v. Misa* (1875), L. R. 10 Ex. 153, Ex. Ch.; approved *Fleming v. Bank of New Zealand*, (1900) A. C. 577, at p. 586, P. C. (deposit of store warrant by plaintiff's agent).

(*q*) *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95.

(*r*) *Currie v. Misa* (1875), L. R. 10 Ex. at p. 162, per Lush, J.; and cf. *Carlill v. Carbolic Co.*, (1893) 1 Q. B. at pp. 271, 272, per Bowen, L.J.

to support an obligation. But want of value (non-onerosity) may be pleaded in evidence when a bill is challenged on other grounds, as for illegality, fraud, or failure of the consideration" (s). § 27.

Until 1875 it was uncertain how far an antecedent debt constituted a sufficient consideration for an instrument payable on demand. In the case of a bill or note payable *in futuro* it was said that the suspension of the creditor's remedies during the currency of the instrument constituted value; but that when the instrument was payable on demand there was no such giving time; in *Currie v. Misa* (t), the Court pointed out that there is no valid distinction between a bill payable *in futuro* and a bill payable on demand. In each case the instrument operates as conditional payment of the past debt, that is to say, it is payment of the debt unless and until the bill is dishonoured. Except where there is a lien by implication of law, in order that a past debt may constitute value the bill or note must, of course, be given in respect of the debt (u). In *Ex parte Richdale* (x), the payee of a post-dated cheque paid it in to his bankers who credited it to his account. The payee failed, and it was held that his trustee could not recover the amount from the drawer, on the broad ground that as soon as his account was credited with the amount of the cheque the bankers became holders for value, whether his account was overdrawn or not. Where bankers collect bills or cheques for customers, it seems to be a question of fact in each case whether they hold the proceeds *quâ* bankers, *i.e.*, debtors, or as trustees for their customer, the presumption being that they are debtors (y).

(s) *Bell's Princ.*, 9th ed. § 333 b.

(t) *Currie v. Misa* (1875), L. R. 10 Ex. 153, Ex. Ch.; approved *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95; cf. *Marreco v. Richardson*, (1908) 2 K. B. at p. 592, C. A.

(u) Cf. *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained in *Currie v. Misa*, L. R. 10 Ex. at p. 164, and *M'Lean v. Clydesdale Bank*, 9 App. Cas. at p. 114.

(x) *Ex parte Richdale* (1882), 19 Ch. D. 409, C. A.; approved *Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. at p. 718, C. A.; and cf. *National Bank v. Silke*, (1891) 1 Q. B. at p. 439; *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, at p. 245, H. L.

(y) Cf. *Re Commercial Bank of South Australia* (1887), W. N. p. 44; *Ex parte Plitt*, *Re Brown* (1889), 6 Morrell, 81; *Gordon v. London and Midland Bank*, (1902) 1 K. B. 242, C. A.; affirmed, (1903) A. C. 240, H. L.; and see notes to sect. 83, *post*.

§ 27.

Adequacy of value.—The Courts do not inquire into the adequacy of a *bonâ fide* consideration (*z*). This was always the law as regards considerations other than money, but when the consideration was money, the usury laws formerly created a difficulty. This has now been removed (*a*). But inadequacy of consideration may be evidence of bad faith or fraud (*b*). Again, inadequacy of consideration must be distinguished from partial absence of consideration, partial failure of consideration, part payment on account (*c*), or a mere advance made on a bill which is pledged or deposited as security.

Unconscionable Bargains.—Although the adequacy of the value given will not be inquired into where parties contract on an equality, the Court in the exercise of its equitable powers will grant relief, as between immediate parties, either with or without terms, when an unfair advantage has been taken of a person's position, though there may be nothing amounting to positive fraud; *e.g.*, in case of a catching bargain with an expectant heir or reversioner (*d*), or where a woman has been induced to give an accommodation acceptance without independent advice (*e*).

Money-
lenders.

As to harsh and unconscionable dealings between moneylenders and borrowers, see sect. 1 of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51). This enactment enables the Court to give relief if the bargain is harsh and unconscionable by reason of excessive interest or other excessive charges, and extends the old powers of the Courts of Equity (*f*). The Act of 1900 is amended by the

(*z*) *Jones v. Gordon* (1877), 2 App. Cas. 616, H. L.; *Earl v. Peck* (1876), 64 New York R. 596. As to an illusory consideration, *e.g.*, delay of one day, see *Young v. Gordon* (1896), 23 Ct. of Sess. Cas. 419.

(*a*) *Jones v. Gordon*, *supra*, per Ld. Blackburn, at p. 632.

(*b*) *Ibid.*; cf. *Allen v. Davis* (1850), 20 L. J. Ch. 44; *Simon v. Cridland* (1862), 5 L. T. N. S. 524.

(*c*) *Dresser v. Missouri Co.* (1876), 3 Otto, 92, Sup. Ct. U. S.

(*d*) *Aylesford v. Morris* (1873), L. R. 8 Ch. 484; *Nevill v. Snelling* (1880), 15 Ch. D. 679.

(*e*) *Maitland v. Backhouse* (1847), 16 Sim. 58; *Kempson v. Ashbee* (1874), L. R. 10 Ch. 15. Query, effect of the Married Women's Property Acts? And see *ante*, p. 70.

(*f*) *Re A Debtor*, (1903) 1 K. B. 705, C. A.; *Samuel v. Newbold*, (1906) A. C. 461, H. L.; *Sterling v. Rose* (1913), 30 T. L. R. 67; *Kerman v. Wainwright*, (1916) W. N. p. 85 (excessive interest, power to open up closed transaction); as to misdescription of money-

Moneylenders Act, 1911 (1 & 2 Geo. 5, c. 38), which *inter alia* prohibits a moneylender from carrying on business under any name indicating that he is a banker. Sect. 1 protects *bonâ fide* assignees and holders for value of money-lending securities with a proviso that "nothing in this enactment shall render valid an agreement or security in favour of an assignee or holder for value who is himself a money-lender." § 27.

(2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time (*g*). Holder for value.

ILLUSTRATIONS.

1. B. owes C. 50*l*. In order to pay C., A. at B.'s request draws a bill on B. for 50*l*. in favour of C. C. is a holder for value and can sue A., though A. has received no value (*h*).

2. A. draws a bill on B. payable to his own order. B., to accommodate A., accepts it. Subsequently A. gives value to B. A. is a holder for value (*i*).

3. B. makes a note in favour of C. C. is the treasurer of a loan society, and the consideration for the note is money advanced by the society to B. C. is a holder for value (*k*).

4. C., the holder of a bill, indorses it in blank to D., receiving no value. D. for value transfers it by delivery to E. E. is a holder for value (*l*).

5. A., at the request of X., draws a bill payable to C. for X.'s account with C. X. remits the bill to C. C. is a holder for value. It is immaterial that there is no consideration between A. and X., or that the consideration fails (*m*).

6. S., in the West Indies, is indebted to C. in Paris. In order to pay him, S. remits money to X., his correspondent in London, who thereupon obtains a bill for the amount, drawn by A. upon

lender in promissory note, see *Peizer v. Lefkowitz*, (1912) 2 K. B. 235, C. A.; and see *Laws of England*, tit. Money and Money Lending.

(*g*) *Hunter v. Wilson* (1849), 4 Exch. 489; New York Negotiable Instruments Law, § 52.

(*h*) *Scott v. Lifford* (1808), 1 Camp. 246.

(*i*) *Burdon v. Benton* (1847), 9 Q. B. 843.

(*k*) *Lomas v. Bradshaw* (1850), 19 L. J. C. P. 273.

(*l*) *Barber v. Richards* (1851), 6 Exch. 63.

(*m*) *Munroe v. Bordier* (1849), 8 C. B. 862; *Watson v. Russell* (1862), 3 B. & S. 34; 31 L. J. Q. B. 304; (1864), 5 B. & S. 968, Ex. Ch.; 34 L. J. Q. B. 93.

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value.

Paris, payable to C.'s order. X. remits the bill to C., but fails before he pays A. for it. S. subsequently pays C. C. is a holder for value, and can sue A. (*n*).

In Illust. 6, C. would be trustee for S.: see "holder" defined by sect. 2, and "holder in due course" by sect. 29. As to the holder's rights as such, see sect. 38. In the Scotch cases a holder for value is termed an "onerous holder."

Sale of Bill.—In legal language, a bill is said to be sold when it is transferred by delivery without indorsement (*o*). Not so in mercantile language. Suppose Smith in London wishes to pay 1,000 rupees to Brown in India. Smith goes to Jones, who has a correspondent in Calcutta, and gets him to draw a bill on Calcutta for Rs. 1,000. Usually the bill is drawn payable to Brown, but sometimes it is drawn payable to Smith, who then indorses it to Brown. The amount paid by Smith to Jones for this bill depends on the rate of exchange between London and Calcutta on the day of the transaction. In some trades the custom is for Smith to pay Jones when he gets the bill; in other trades it is the custom not to pay till the next mail day. Such a transaction is called a sale of the bill by Jones to Smith. Smith, the buyer, who sends the bill out to India, is called the "remitter" (*p*). As to fixing the rate of exchange at which a bill is to be sold, see note to sect. 9, *ante*. See the conditions which regulate the rate of exchange between two countries, and the mode in which those conditions are taken advantage of, fully discussed in *Goschen's Foreign Exchanges*.

See, too, the judgment of Wood, V.-C., explaining the practice of paying for bills partly by cash, partly by bankers' "marginal notes" or "marginal receipts" (*q*).

A holder for value may or may not be a holder in due course (*r*). The holder of a bill who receives it from a holder for value, but does not himself give value for it,

(*n*) *Poirier v. Morris* (1853), 2 E. & B. 89.

(*o*) See *post*, p. 222, and *Daniel*, § 733 a.

(*p*) Cf. *Comber v. Leyland*, (1898) A. C. at pp. 530, 531.

(*q*) *Jeffryes v. Agra Bank* (1866), L. R. 2 Eq. 676; cf. *Ex parte Kemp* (1874), L. R. 9 Ch. 383.

(*r*) *Raphael v. Bank of England* (1855), 17 C. B. at p. 174; cf. sect. 29, *post*; and *Partridge v. Bank of England* (1846), 9 Q. B. at p. 426, Ex. Ch.

has all the rights of a holder for value against all parties to the bill except the person from whom he received it, see sect. 29 (3), *post*.

§ 27.

“A bill of exchange,” says Parke, B., “is a chattel, and the gift is complete by delivery, coupled with the intention to give” (s).

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (t). Holder having a lien.

ILLUSTRATIONS.

1. D. holds a bill indorsed in blank as agent for C.: D. wrongfully pledges it with E. E. is a holder for value to the extent of the sum he advanced, and if he took the bill without notice of the fraud, he can retain the bill as against C., the true owner (u).

2. C., the holder of a bill for 100*l.*, deposits it with D. as security for a running account. At the time the bill matures the balance is in C.'s favour, but subsequently the balance turns against him to the extent of 50*l.* D. is a holder for value as to 50*l.* (x).

3. C., the holder of a bill for 100*l.*, indorses it to D. as a pledge for 50*l.* D. is a holder for value as to 50*l.*, and this is the sum he can recover if he sues C. (y).

4. C. keeps with his bankers a loan account and a general account. C. indorses to the bank, as collateral security for his loan account, a bill for 1,000*l.*, and draws against it to the extent of 500*l.* C. becomes bankrupt, and his general account is overdrawn more than 500*l.* The bank are holders of the bill for full value (z).

5. The drawer of a bill for 100*l.*, which has been accepted for his accommodation, indorses it to C. as a security for 50*l.* If the acceptor becomes bankrupt, C. can tender a proof for 100*l.*, but can only receive dividends to the extent of 50*l.* (a).

(s) *Milnes v. Dawson* (1850), 5 Exch. 948, at p. 950; cf. *Denton v. Peters* (1870), L. R. 5 Q. B. at p. 477.

(t) New York Negotiable Instruments Law, § 53; *Paget on Banking*, ed. 2, p. 305. As to consideration generally, and the rules for its impeachment, see *post*, pp. 111–120.

(u) *Collins v. Martin* (1797), 1 B. & P. 648.

(x) *Atwood v. Crowdie* (1816), 1 Stark. 483; cf. *Pease v. Hirst* (1829), 10 B. & C. 122; *Gray v. Seckham* (1872), L. R. 7 Ch. at p. 683.

(y) *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

(z) *Re European Bank* (1872), L. R. 8 Ch. 41.

(a) *Ex parte Newton* (1880), 16 Ch. D. 330, C. A.

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6. A bill indorsed by a customer to his banker and entered "short," remains the property of the customer, though the banker may have a lien on it (*b*).

The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security (*c*). A "discount" is a holder for full value (*d*). Treasury bills furnish a good example of a discount transaction. They bear no interest, but are offered on the money market at a fixed rate of discount. The position of a pledgee is this: If he sue a third party he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill (*e*). If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice. Like any other bailee, the pledgee of a bill must use due diligence with reference to it, having regard to the peculiar nature of the thing bailed, *e.g.*, he must not part with it: he must if he can collect it at maturity; if he cannot, he must give the proper notices of dishonour (*f*).

Banker's Lien.—A banker's lien on negotiable securities is "an implied pledge" (*g*). A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer (*h*). If the banker knows that the bills

(*b*) *Thompson v. Giles* (1824), 2 B. & C. 422; distinguished *Ex parte Stannard* (1893), 10 Morrell, 193, 212 (Cheques).

(*c*) *Ex parte Twogood* (1812), 19 Ves. 229; *Re Gomersall* (1875), 1 Ch. D. at p. 142; *Ex parte Schofield* (1879), 12 Ch. D. 337, C. A., bills indorsed "pending discount."

(*d*) *Ibid.*; cf. *Thiedman v. Goldsmidt* (1859), 1 De G. F. & J. at p. 11. The term "discount" is somewhat loosely used. It properly applies to the party who buys, and not to the party who sells, the bill. As to the operations of the discount market, see *Spalding's Foreign Exchange and Foreign Bills*, Ch. XX.

(*e*) *Reid v. Furnival* (1833), 1 Cr. & M. 538.

(*f*) *Peacock v. Purssell* (1863), 32 L. J. C. P. 266.

(*g*) *Brandao v. Barnett* (1846), 3 C. B. at p. 531, H. L. A "lien" generally is a mere right to hold a thing till a debt is paid, and is therefore distinct from a pledge, because the pledgee has a special property in the thing pledged; but in the case of a negotiable security the person who has the lien is the holder of the instrument with the corresponding rights and duties, and he therefore has more than the ordinary lien on an ordinary chattel.

(*h*) *Ibid.*; *London Chartered Bank of Australia v. White* (1879),

do not belong to his customer, no lien can attach (*i*). A broker who deals in bills may have a lien similar to a banker's (*k*). If a banker releases negotiable securities pledged with him by a bill-broker on receiving the bill-broker's cheque, and the cheque is dishonoured, the securities are not impressed with any trust in favour of the banker (*l*).

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The terms on which securities are deposited may, of course, be such as to create a particular lien to the exclusion of the general lien (*m*).

Primâ facie, where a bill is negotiated from one person to another, it is deemed to have been wholly transferred to him, and not to have been pledged or deposited as collateral security (*n*).

28. (1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person (*o*).

Accommodation bill or party.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not (*p*).

Liability of accommodation party.

4 App. Cas. 413, P. C.; *Johnson v. Roberts* (1875), L. R. 10 Ch. 505, where customer was a country bank; *Currie v. Misa* (1876), 1 App. Cas. at p. 569, H. L.; and cf. *Coleman v. Bucks and Oxon Bank*, (1897) 2 Ch. 243, as to application of trust funds to customer's private overdraft.

(*i*) *Ex parte Kingston* (1871), L. R. 6 Ch. 632; cf. *Thomson v. Clydesdale Bank*, (1893) A. C. at p. 289, H. L.

(*k*) *Jones v. Peppercorn* (1858), John. 430; 28 L. J. Ch. 158.

(*l*) *Lloyds' Bank v. Swiss Bankverein* (1913), 18 Com. Cas. 79, C. A. As to the nature of a bill-broker's business, see the judgment of Hamilton, J., in the Court below, 17 Com. Cas. 280, and *Spalding's Foreign Exchange and Foreign Bills*, p. 199.

(*m*) *Re Bowes* (1886), 33 Ch. D. 586.

(*n*) *Hills v. Parker* (1866), 14 L. T. N. S. 107; *Re Boys* (1870), L. R. 10 Eq. 467; cf. *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

(*o*) New York Negotiable Instruments Law, § 55, and cases cited in *Crawford's* edition.

(*p*) New York Negotiable Instruments Law, § 55.

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ILLUSTRATIONS.

1. Bill accepted for the accommodation of the drawer. This is an accommodation bill, and the acceptor is an accommodation acceptor (*q*).

2. Bill drawn, indorsed, and accepted for the accommodation of X., who is not a party thereto. The drawer and acceptor receive a commission for so doing. This is an accommodation bill (*r*).

3. Bill drawn against a running account, and accepted. This, it seems, is not an accommodation bill, though the account may have been against the drawer when the bill was drawn, or accepted, or payable (*s*).

4. Bill drawn payable to the order of C., and accepted. It appears that the acceptor was indebted to C., but that the drawer signed to accommodate the acceptor. This is not an accommodation bill, though the drawer is an accommodation drawer (*t*).

5. Bill payable to drawer's order is accepted for value. C., whose name is well known, indorses the bill to give it currency. This is not an accommodation bill, but C. is an accommodation indorser (*u*).

A bill which is signed by one or more accommodation parties is frequently spoken of as an accommodation bill, but this is incorrect. An accommodation bill is a bill whereof the acceptor (*i.e.*, the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto (*x*). The distinction is material when questions arise as to what is a discharge of the bill. An accommodation bill is discharged when it is discharged by the person who is in substance, though not in form, the principal debtor (see, *e.g.*, sect. 59 (3)), or if time be given to such person (*y*). As a general rule the drawer or indorser for whose accommodation a bill is accepted, cannot

(*q*) *Collott v. Haigh* (1812), 3 Camp. 281.

(*r*) *Oriental Financial Corporation v. Overend* (1871), L. R. 7 Ch. 142.

(*s*) *Ex parte Swan* (1868), L. R. 6 Eq. at p. 356; cf. *Wilks v. Hornby* (1862), 10 W. R. 742.

(*t*) *Scott v. Lifford* (1808), 1 Camp. 246; cf. *Sleigh v. Sleigh* (1850), 5 Exch. 514.

(*u*) Cf. *Re Nunn* (1817), Buck, 113. This practice is not uncommon in the case of foreign bills, a small commission being usually charged. See, *e.g.*, *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. 849.

(*x*) Cf. *Oriental Financial Corporation v. Overend* (1871), L. R. 7 Ch. at pp. 146, 151, and *ibid.*, L. R. 7 H. L. at p. 358; *Ex parte European Bank* (1871), L. R. 7 Ch. 99.

(*y*) See last note. And see *post*, p. 251, Principal and Surety.

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avail himself of want of due presentment for payment (sect. 46 (2)), or notice of dishonour (sect. 50 (2)), or protest (sect. 51 (9)), because it is his own duty to provide the funds to meet the bill at maturity. As to negotiation of overdue accommodation bill, see note to sect. 36 (2), *post*.

An accommodation party, known to be such, may avail himself of any defence, arising out of the bill transaction, which the person accommodated could have set up (z): see "holder for value" defined by sect. 27 (2) and (3). *Primâ facie* every party to a bill is deemed to have become a party thereto for value: see sect. 30, *post*.

The term "finance bill" is somewhat loosely used. It denotes a bill which is issued for the purpose of raising money, and which is not based on any trading transaction. Whether it is an accommodation bill or not depends on the arrangement between drawer and drawee, but normally it is an accommodation bill. The finance bill is largely used in connection with arbitrage transactions. Strictly, perhaps, the term should be restricted to long bills drawn by the banks and accepting houses of one country on those of another for the express purpose of raising money at an opportune moment: see *Spalding's Foreign Exchange and Foreign Bills*, Ch. XIX.

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

Holder in due course.

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact (a):

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any

(z) *Bechervaise v. Lewis* (1872), L. R. 7 C. P. 372, at p. 377.

(a) See *Hornby v. McLaren* (1908), 24 T. L. R. 494, C. A. (cheque known to have been dishonoured).

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defect in the title of the person who negotiated it (*b*).

ILLUSTRATIONS.

Holder in due course.

1. C., the holder of a bill payable to his order, transfers it to D. for value, but without indorsing it. C. has obtained this bill by fraud, but D. has no notice of this. D. is not a holder in due course (*c*).

2. C., who resides abroad, transmits a bill for collection to his agent in England. C. has obtained this bill by fraud, but his agent does not know it. At the time the agent receives the bill, C. is indebted to him on the balance of account. The agent is not a holder in due course, and cannot recover on the bill. *Aliter*, if the bill had been transmitted to the agent in payment of his debt (*d*).

3. C. indorses a bill to D. for value. D. suspects that C. stole the bill. As a fact he obtained it by false pretences. D. is not a holder in due course (*e*).

4. The manager of a bank steals negotiable securities from the bank, and pledges them with C. He afterwards obtains them back from C. by a fraud, and replaces them in the bank. The bank know nothing of the transactions. The bank is the holder in due course of these securities, and entitled to retain them against C. (*f*).

5. X., by false pretences, induces A. to draw a cheque in favour of C., who takes it in good faith and for value. C. is a holder in due course (*g*).

6. Bill in ordinary form payable thirty days after sight. It is "complete and regular," although it has not been accepted (*h*).

By sect. 2, "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer

(*b*) Cf. New York Negotiable Instruments Law, § 91, and cases cited in *Crawford's* edition; *Lloyd's Bank v. Cooke*, (1907) 1 K. B. at p. 808, per Moulton, L.J.

(*c*) *Whistler v. Forster* (1863), 14 C. B. N. S. at p. 258; 32 L. J. C. P. at p. 163. D. is not the "holder" as defined by sect. 2.

(*d*) *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained by *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164; and *M'Lean v. Clydesdale Bank* (1883), 9 App. Cas. at p. 114.

(*e*) Cf. *Jones v. Gordon* (1877), 2 App. Cas. at p. 628.

(*f*) *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 535, C. A.; cf. *London Joint Stock Bank v. Simmons*, (1892) A. C. 201.

(*g*) *Watson v. Russell* (1862), 31 L. J. Q. B. 304; cf. *Lloyd's Bank v. Cooke*, (1907) 1 K. B. 794, C. A., per Moulton, L.J.; *Talbot v. Von Boris*, (1911) 1 K. B. 854, C. A.

(*h*) *National Park Bank of New York v. Berggren* (1914), 19 Com. Cas. 234.

thereof; and "bearer" means the person in possession of a bill or note which is payable to bearer: see "value" defined by sect. 27 (1); and "holder for value" by sect. 27 (2), (3). As to the rights of the "holder" and "holder in due course" respectively, see sect. 38, *post*. As to "negotiation," see sect. 31, *post*; and as to overdue or dishonoured bills, see sect. 36, *post*. As to defects in title, see sub-sect. (2), *post*.

It has been doubted how far the original payee of a bill or note which has been obtained by fraud can be a "holder in due course" (*i*); but Moulton, L.J., argues forcibly that he may be (*k*). The term holder in express words includes a payee. Suppose X. by fraud induces A. to draw a cheque in favour of C., who takes it in good faith and for value. Why is not C. a holder in due course? He clearly was before the Act (*l*).

The Act has substituted the positive term "holder in due course" for the cumbrous negative equivalent "*bonâ fide* holder for value without notice," and its synonyms "*bonâ fide* holder," "innocent indorsee," &c. The Indian Act (sect. 9) has adopted the same term. The French equivalent, "*tiers porteur de bonne foi*," *i.e.*, third party holder in good faith, is expressive.

"Notice" means actual, though not formal notice, that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge (*m*). As to "good faith" and the tests thereof, see sect. 90, *post*, and notes thereto, where the subject is fully discussed. In the United States it seems that if the holder takes a bill in good faith, but gets notice of a defect in the title of his transferor before he has given

Notice.

(*i*) *Lewis v. Clay* (1897), 14 Times L. R. at p. 150; *Herdman v. Wheeler*, (1902) 1 K. B. 361.

(*k*) *Lloyd's Bank v. Cooke*, (1907) 1 K. B. 794, C. A.; cf. *Talbot v. Von Boris*, (1911) 1 K. B. 854, C. A.

(*l*) *Watson v. Russell* (1862), 3 B. & S. 34; affirmed, 5 B. & S. 968, Ex. Ch.

(*m*) *Raphael v. Bank of England* (1885), 17 C. B. at p. 174, per Willes, J.; cf. *Ex parte Snowball* (1872), L. R. 7 Ch. at p. 549. "A person may be proved to have had notice of an act of bankruptcy either by proof that he had received formal notice, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed": cf. New York Negotiable Instruments Law, § 95, defining "notice" as actual knowledge or "knowledge of such facts that his action in taking the instrument amounted to bad faith."

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full value, he is only deemed a holder in due course to the extent he has paid before getting notice (*n*).

Principal and agent.—As regards the parties affected with notice, the ordinary rules of law apply to bills and notes. Notice to the principal is notice to the agent; and notice to the agent is notice to the principal (*o*), subject to the proviso (1) that when the agent is himself a party to a fraud he is not to be taken to have disclosed it to his principal (*p*); and (2) where a bill is negotiated to an agent, and notice is given to the principal, or *vice versa*, there must be a reasonable time for communication (*q*).

Bill must be complete and regular.

The rights of a holder in due course can only be acquired by a person who takes a bill before it is overdue, and which is "complete and regular on the face of it." If the bill itself conveys a warning, *caveat emptor*. The holder, however honest, can acquire no better title than the person from whom he took it had. Thus, if the holder takes a blank acceptance, or a bill wanting in any material particular, he takes it at his peril (*r*); so also if the holder takes a bill which has been torn and the pieces pasted together, if the tears appear to show an intention to cancel it (*s*).

An American judgment puts the point clearly. Some negotiable county bonds, which had been indorsed in blank by the payee, were stolen. The thief erased the payee's indorsement, personated the payee himself, and sold the bonds to a person who purchased them in perfect good faith. It was held that the purchaser acquired no title, and that the erasure, at any rate, ought to have put him on his guard. In the judgment it is said (*t*): "He did not rely upon anything that appeared upon the bonds.

(*n*) New York Negotiable Instruments Law, § 93, and cases cited in *Crawford's* edition.

(*o*) *Cf. Collinson v. Lister* (1855), 7 De G. M. & G. at p. 637, branch bank.

(*p*) *Ex parte Oriental Bank* (1870), L. R. 5 Ch. 358.

(*q*) *Cf. Willis v. Bank of England* (1835), 4 A. & E. at p. 39.

(*r*) *Aude v. Dixon* (1851), 6 Exch. 869, and cases in note to sect. 20. *ante*.

(*s*) *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294; *cf. Scholey v. Ramsbottom* (1810), 2 Camp. 485; *Redmayne v. Burton* (1860), 2 L. T. N. S. 324.

(*t*) *Colson v. Arnot* (1874), 54 New York R. 253, at p. 260; *cf. Angle v. N. W. Ins. Co.* (1875), 2 Otto, at p. 342, Sup. Ct. U. S.

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He relied on the representations of the thief, and was deceived by them. Against such deception the laws applicable to negotiable paper were not intended to guard. It is their purpose to facilitate the circulation of paper, fair and regular upon its face, and to protect the *bonâ fide* purchasers of such paper. . . . Suppose a thief should erase the name of the maker of a note, and then forge the same signature, could he give a *bonâ fide* purchaser for value title to the paper? I am clearly of opinion he could not. The paper is not fair upon its face. There is a forgery, and although the purchaser may be ignorant of it, the law merchant does not protect him against such ignorance. He must know at his peril that the signatures are genuine. We are asked, suppose the name of the payee, indorsed upon negotiable paper, fades out so as to be invisible, does it affect the negotiable character of the paper? Most certainly it does. The title and rights of the owner remain the same as before, but a thief could give no title to such a paper to any one because he cannot be the apparent owner thereof, and there is nothing on the face of the paper to induce the belief that he is the owner."

The fact that a cheque is post-dated does not make it irregular within the meaning of this section (*u*).

By sect. 45 of the Larceny Act, 1916 (6 & 7 Geo. 5, Stolen bills. c. 50), when a thief is prosecuted to conviction the stolen property is to be restored to the owner, but this provision does not apply to "any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received, by transfer or delivery, by some person or body corporate for a just and valuable consideration without any notice and without any reasonable cause to suspect that the same has been stolen." This section reproduces in slightly altered language sect. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which is repealed (*x*).

(*u*) *Hitchcock v. Edwards* (1889), 60 L. T. N. S. 636; and see notes to sect. 13 (2), *ante*.

(*x*) Cf. *Chichester v. Hill* (1882), 52 L. J. Q. B. 160; and *Moss v. Hancock*, (1899) 2 Q. B. at p. 118, with regard to the Act of 1861. As to courts of summary jurisdiction, see sect. 27 (3) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

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Defects of
title.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (*y*).

This list of defects in title may not be exhaustive. A person whose title is defective must be distinguished from a person who has no title at all, and who can give none; as, for instance, a person making title to a bill through a forged indorsement: see sect. 24, *ante*, and see "holder" defined in sect. 2, *ante*.

The words "force and fear" were inserted in committee as the equivalent of the English technical term duress, which is unknown to Scotch law. See *Bell's Principles*, 9th ed., § 12.

Holder
claiming
under holder
in due course.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (*z*).

ILLUSTRATIONS.

1. A partner in a firm fraudulently indorses a firm bill to D. in payment of a private debt. F. is cognizant of the fraud, but is not a party to it. D. indorses the bill to E., who takes it for value and without notice. E. indorses it to F. F. acquires E.'s rights. If he gave value to E., he can sue all the parties

(*y*) New York Negotiable Instruments Law, § 94.

(*z*) *May v. Chapman* (1847), 16 M. & W. 355, at p. 361; *Masters v. Ibberson* (1849), 8 C. B. 100; *Marion County v. Clark* (1876), 4 Otto, 278, Sup. Ct. U. S.: cf. New York Negotiable Instruments Law, § 97.

to the bill; if he did not give value, he can sue all parties except E. (a).

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2. C., by fraud, induces B. to make a note in his favour. C. indorses the note to D., who takes it for value and without notice. Subsequently D. indorses the note for value back to C. C. cannot sue B. (b).

30. (1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value (c). Presumption of value and good faith.

(2) Every holder of a bill is *primâ facie* deemed to be a holder in due course (d); but if in an action on a bill it is admitted or proved (e) that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (f).

ILLUSTRATIONS.

1. A. draws a bill on B. and indorses it to C. C. sues B. It is shown that B. accepted it for A.'s accommodation. C. is not called on to prove that he gave value; he can recover without so doing (g).

2. B. makes a note payable to C. C. indorses it to D., who sues B. If it appears that B. made the note for an illegal consideration, D. must prove that he gave value in good faith (h).

(a) *May v. Chapman* (1847), 16 M. & W. 355.

(b) Cf. *Sawyer v. Wisewell* (1864), 91 Massachusetts R. at p. 42.

(c) Cf. *Hatch v. Traves* (1840), 11 A. & E. 702; *Foster v. Dawber* (1851), 6 Exch. at p. 853; New York Negotiable Instruments Law, § 98.

(d) *King v. Milsom* (1809), 2 Camp. 6; New York Negotiable Instruments Law, § 98.

(e) Evidence to go to a jury was the old test: *Hall v. Featherstone* (1858), 3 H. & N. at p. 286; 27 L. J. Ex. at p. 311; and the Act has not altered this: *Tatam v. Haslar* (1889), 23 Q. B. D. 345, at pp. 348, 349.

(f) See *Jones v. Gordon* (1877), 2 App. Cas. at pp. 627, 628, per Lord Blackburn; cf. New York Negotiable Instruments Law, § 98.

(g) *Mills v. Barber* (1836), 1 M. & W. 425.

(h) *Bailey v. Bidwell* (1844), 13 M. & W. 73.

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3. The holder of a bill indorses it to D. to get it discounted. D. fraudulently negotiates it to E., who negotiates it to F. F. sues the acceptor. Evidence is given of D.'s fraud. F. must prove that he is an honest holder for value (*i*).

4. B. makes a note payable to C., the consideration for which is a wager, *i.e.*, a consideration void by statute, but not prohibited under a penalty. C. indorses it to D., who sues the maker. Evidence is given of these facts. D. is not called on to prove that he gave value (*k*).

5. Action against the maker of a note payable to bearer. It is shown to have been stolen from the true owner. It lies on the holder to prove that he gave value in good faith (*l*).

6. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he is an honest holder for value (*m*).

7. A partner accepts a bill in the firm's name for a private debt and in fraud of his co-partners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he is an honest holder for value (*n*).

8. Action by *payee* against husband and wife, the makers of a joint and several promissory note. The wife signed the note under duress from her husband. The onus of proof is not shifted. The wife must give evidence showing that the payee had notice of the duress (*o*).

"At the time of the passing of the Act of 1882," says Charles, J., "it was uncertain how much the plaintiff had to prove in cases of this kind where evidence of fraud had been given. Lord Blackburn, in *Jones v. Gordon*, says: 'The language of the quotation from Baron Parke would seem to show that the onus as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case.' The learned judge who tried this case (Field, J.) took the view that the onus was shifted only to the extent of making the plaintiff prove that value was in fact given, not that it was also given *bonâ fide*. Upon this construction of the Act, I respectfully differ from him. The plaintiff was bound to

(*i*) Cf. *Smith v. Braine* (1851), 16 Q. B. 244; *Berry v. Alderman* (1853), 14 C. B. 95; *Tatam v. Haslar* (1889), 23 Q. B. D. 535.

(*k*) *Fitch v. Jones* (1855), 5 E. & B. 238; *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

(*l*) *Raphael v. Bank of England* (1855), 17 C. B. 161.

(*m*) *Mather v. Maidstone* (1856), 18 C. B. 273; 25 L. J. C. P. 310.

(*n*) *Hogg v. Skeen* (1865), 18 C. B. N. S. 426; 34 L. J. C. P. 153.

(*o*) *Talbot v. Von Boris*, (1911) 1 K. B. 854, C. A.

satisfy the jury that he gave value, and that he gave it in good faith. The Act has settled the law in accordance with the opinion expressed by Parke, B." (*p*). § 30.

Sub-sect. (2) does not apply to the original payee of a note, but only to subsequent parties. In the case of an original payee the ordinary common law rule prevails that a person alleging fraud or duress must prove it (*q*).

The section does not affect the practice of the Chancery Division, according to which security must be given when it is sought to restrain the negotiation of a bill alleged to have been obtained by fraud (*r*).

"Force and fear" is the Scottish equivalent of the English term "duress," but its signification, perhaps, is somewhat wider: see *Bell's Principles*, 9th ed., § 12.

In America, it has been held that if the holder has in good faith given partial value, as in the case of a lien or pledge, he may recover *pro tanto* (*s*). Probably the same would be held in England.

Rules as to Impeachment of Value.

The law as to absence of consideration, or its failure, total or partial, fraud, or illegality of consideration may, perhaps, be expressed in the following rules:—

Rule 1. Any defence available against an immediate party is available against a remote party who is in privity with such immediate party. Immediate and remote parties.

Explanation 1.—"Immediate parties" are parties in direct relation with each other. All other parties are remote. *Primâ facie*, the drawer and acceptor, the drawer and the payee, the indorser and his indorsee, are in direct relation. For example:

1. A. draws a bill on B. payable to C., and delivers it to the latter. B. accepts the bill while in C.'s hands. B. and C. are remote parties (*t*).

(*p*) *Tatam v. Haslar* (1889), 23 Q. B. D. 345, at p. 349; cf. *Jones v. Gordon* (1877), 2 App. Cas. at p. 628; and *Bailey v. Bidwell* (1844), 13 M. & W. 73, at p. 76, per Parke, B. See, too, *Oakley v. Boulton* (1888), 5 Times L. R. 60, C. A., and the note thereon in *Byles*, ed. 16, p. 147.

(*q*) *Talbot v. Von Boris*, (1911) 1 K. B. 854, C. A.

(*r*) *Hawkins v. Ward* (1890), W. N. p. 203.

(*s*) *Holcomb v. Wyckoff* (1870), 10 Amer. R. 219; *Dresser v. Missouri Co.* (1876), 3 Otto, 92, Sup. Ct. U. S.

(*t*) *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch.

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2. B. makes a note payable to C. *Primâ facie* B. and C. are immediate parties; but if it appear that B. made the note at the request of X. under the belief that he had done something which he had not done, and that X. on his own account delivered the note to C., who gave value and took it without notice, then B. and C. are remote parties (*u*). *Aliter*, if X. had been C.'s agent (*x*).

Explanation 2.—Privity is created in all cases by want of consideration, and in some cases by notice; it may also be created by agreement.

1. The holder of a bill who has not himself given value, is, as regards third parties, deemed to be the agent of the party from whom he received it, whatever their private relations may be (*y*). 2. Notice creates privity when it is notice of defective *title* in the party from whom the bill is taken, *i.e.*, notice that he had no right to hold the bill or no right to part with it. Title to a bill must be distinguished from the right to enforce payment of it against particular parties—*e.g.*, the donee of a bill has a good title, though he could not enforce payment against the donor. Whenever a bill is held adversely to the true owner, and there is privity between the true owner and the holder, a third party, if sued, may set up the *jus tertii* (*z*). 3. Again, when a person expressly or impliedly agrees to hold a bill as agent or trustee for another person, he holds it subject to all defences against the person for whom he holds, irrespective of the state of accounts between them (*a*).

Absence of
value.

Rule 2. Mere absence of consideration, total or partial, is matter of defence against an immediate party or a remote party, who is not a holder for value, but it is not a defence against a remote party who is a holder for value (*b*).

An accommodation party is liable to a holder for

(*u*) Cf. *Watson v. Russell* (1862), 3 B. & S. 34; 31 L. J. Q. B. 304.

(*x*) *Astley v. Johnson* (1860), 5 H. & N. 137; 29 L. J. Ex. 161.

(*y*) Cf. *Fitch v. Jones* (1855), 5 E. & B. at p. 246; and cases quoted *ante*, p. 62; also *Lee v. Hayes* (1865), 17 Ir. C. L. R. at p. 408.

(*z*) See Rule 5, and notes to sect. 21.

(*a*) *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164, Ex. Ch.

(*b*) Cf. *Forman v. Wright* (1851), 11 C. B. at p. 492.

value, who takes a bill knowing him to be such (c). For example:— § 30.

1. B., by way of gift, makes a note in favour of C. C. cannot recover from B. (d).

2. C., the holder of a bill for value, indorses it to D. by way of gift. The property in the bill passes to D., but he cannot recover from C. (e).

3. Bill for 100*l.* accepted for the accommodation of the drawer. The drawer discounts it with C., who knows that it is an accommodation bill. C. can sue the drawer or acceptor for 100*l.* (f); but if C., instead of discounting it, merely advanced 50*l.* on it, he can only recover 50*l.* (g).

4. B. owes A. 50*l.* A. draws a bill on B. for 100*l.* B., to accommodate A., and at his request, accepts it. If A. sue B. he can recover only 50*l.* (h).

5. C. is D.'s agent abroad. C. purchases a bill for D. The bill is made payable to C.'s order, and he indorses it to D. This is done merely for the purpose of safe transmission, and not to guarantee the bill. If the bill is dishonoured, C. is not liable to D. as indorser (i).

6. A. and C. supply goods to B. A. draws a bill on B. for the price, and indorses it to C. to collect on joint account. If the bill is dishonoured, A. is not liable to C. (k).

7. B. accepts a bill drawn by A. to accommodate him. A. indorses it to C. without receiving value. C. indorses to D. without receiving value. D. cannot recover from B., but it lies on B. to show that neither D. nor any intervening holder was a holder for value (l).

(c) *Scott v. Lifford* (1808), 1 Camp. 246; cf. *Strong v. Foster* (1855), 17 C. B. at p. 222; *Petty v. Cooke* (1871), L. R. 6 Q. B. 790; and sect. 28 (2).

(d) *Holliday v. Atkinson* (1826), 5 B. & C. 501; cf. *Re Whitaker* (1889), 45 Ch. D. 119, C. A., as to voluntary note given by lunatic.

(e) *Easton v. Pratchett* (1835), 1 C. M. & R. at p. 808; cf. *Milnes v. Dawson* (1850), 5 Exch. 948.

(f) Cf. *Mills v. Barber* (1836), 1 M. & W. 425; *Sturtevant v. Ford* (1842), 4 M. & Gr. 101.

(g) *Nash v. Brown* (1817), cited Chitty, 11th ed. p. 60; *Jones v. Hibbert* (1817), 2 Stark. 304; *Ex parte Newton* (1880), 16 Ch. D. 330, C. A., proof.

(h) *Darnell v. Williams* (1817), 2 Stark. 166.

(i) *Castrique v. Buttigieg* (1855), 10 Moore, P. C. 110; cf. *Re Nunn* (1817), Buck, 113.

(k) *Denton v. Peters* (1870), L. R. 5 Q. B. 475.

(l) *Mills v. Barber* (1836), 1 M. & W. 425; cf. *Thompson v. Clubley* (1836), 1 M. & W. 212.

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8. The payee of a cheque puts it into the hands of his infant child. He then takes it away and locks it up, saying he intends the child to have the money. Subsequently he dies. This is neither a gift nor a declaration of trust (*m*).

Although the donee of a note cannot sue the donor on the instrument, the making of a note in favour of the donee may perhaps be evidence of a declaration of trust in favour of the donee (*n*). *Sed qu.*?

Total failure
of value.

Rule 3. Total failure of consideration is a defence against an immediate party, but it is not a defence against a remote party, who is holder in due course (*o*). For example:—

1. B. makes a note payable to C. The only consideration is that C. is to act as B.'s executor. C. dies first. His personal representatives cannot enforce payment against B. (*p*).

2. B. authorizes A. to draw on him against bills of lading. A. draws a bill on B., and indorses it to C. with the bill of lading attached. C. gives value to A. B. accepts the bill on receiving from C. the bill of lading. The bill of lading turns out to be a forgery, but C. did not know it when he obtained the acceptances. C. can recover from B. (*q*).

3. A. draws a bill at three months on B. in favour of C., to be paid for in seven days. B., who is A.'s agent, accepts on his account. C. does not pay A. He cannot sue B. (*r*).

4. A. draws a bill on B. payable to his own order. B. accepts. The consideration between A. and B. fails. A. subsequently indorses the bill for value to C., who knows

(*m*) *Jones v. Lock* (1865), L. R. 1 Ch. App. 25.

(*n*) *Arthur v. Clarkson* (1865), 35 Beav. 458; but see the criticisms on this class of cases in *Re Whitaker* (1889), 42 Ch. D. 119, at p. 125, C. A. (voluntary note and voluntary bond distinguished).

(*o*) *Robinson v. Reynolds* (1841), 2 Q. B. at p. 211, Ex. Ch.; cf. *Leather v. Simpson* (1871), L. R. 11 Eq. at p. 407. As to what amounts to total failure, *Wells v. Hopkins* (1839), 5 M. & W. 7; *Hooper v. Treffry* (1847), 1 Exch. 17; cf. *Guarantee Trust Co. of New York v. Hannay*, (1918) 2 K. B. 623, C. A.

(*p*) *Solly v. Hinde* (1834), 2 Cr. & M. 516.

(*q*) *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch.; *Leather v. Simpson* (1871), L. R. 11 Eq. 398; *Guarantee Trust Co. of New York v. Hannay* (1918), 23 Com. Cas. 399; (1918) 2 K. B. 642, 652, C. A.

(*r*) *Astley v. Johnson* (1860), 5 H. & N. 137; 29 L. J. Ex. 161.

that the consideration between A. and B. has failed. C. § 30.
cannot sue B. (s).

Failure of consideration, it seems, is a defence against a remote holder for value with notice. The reason probably is that it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed (t). But might there not be cases in which it would not be a fraud to do so? Again, *qu*: as to the effect of failure of consideration after the maturity of the bill, *i.e.*, after a cause of action has accrued? (u). When the consideration for a bill wholly fails, the Court will usually restrain its negotiation by injunction (x).

Rule 4. Partial failure of consideration is a defence Partial failure
of value.
pro tanto against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise (y). It is not a defence against a remote party who is a holder for value (z). For example:—

1. B. accepts a bill for 100*l.* drawn by A. This is the agreed price of goods to be supplied by A. to B. When the goods arrive they are found to be inferior to sample, and worth only 80*l.* B. retains the goods. If A. sue B. on the bill, this is not a defence *pro tanto* (a). But B. could now counterclaim.

2. B. accepts a bill for 100*l.* This is the agreed price of two bales of cotton to be supplied by A. to B. A. only delivers one bale. A. indorses the bill to C., his agent, to collect. C. can only recover 50*l.* (b).

3. B. accepts a bill drawn by A. for 100*l.* This is the agreed price of two bales of cotton to be supplied by A. to B. When the cotton arrives, one bale is found to be inferior to sample, and is returned as useless. A. indorses

(s) *Lloyd v. Davis* (1824), 3 L. J. K. B. 38; cf. *Fairclough v. Parvia* (1854), 9 Exch. 690 (same principle assumed).

(t) Cf. *Oulds v. Harrison* (1854), 10 Exch. at p. 579.

(u) Cf. *Watson v. Russell* (1864), 5 B. & S. at p. 968; 34 L. J. Q. B. 93.

(x) Cf. *Patrick v. Harrison* (1792), 3 Bro. C. C. 476; *Bainbridge v. Hemingway* (1865), 12 L. T. N. S. 74.

(y) *Day v. Nix* (1824), 9 Moore, 159; *Warwick v. Nairn* (1855), 10 Exch. 762.

(z) *Archer v. Bamford* (1822), 3 Stark. 175.

(a) *Glennie v. Imri* (1839), 3 Y. & C. 436; cf. *Hitchings v. Northern Leather Co. of America*, (1914) 3 K. B. 907 (payee *v.* indorser).

(b) Cf. *Agra Bank v. Leighton* (1866), L. R. 2 Ex. at pp. 64, 65.

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the bill to C. without value. If C. sues B. he can only recover 50*l.*, the price of the one bale which is kept (*c*).

In some cases of partial failure of consideration, the Court would perhaps restrain the holder from negotiating the bill after notice (*d*). Before the Judicature Acts it was important to distinguish between defences to an action on the bill, and matters which could only be dealt with by cross-action, *e.g.*, partial failure of consideration where the amount was not a sum certain. But now any such matters can be included in a counterclaim.

Fraud or
duress.

Rule 5. Fraud is a defence against an immediate party and against a remote party who is not a holder in due course (*e*).

A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud (*f*), or coercion (*g*), or when it is negotiated in breach of faith (*h*), or in fraud of third parties (*i*).

The holder of a bill subsequent to a fraud, who is not a holder in due course, cannot enforce payment against any party thereto, neither can he retain the bill against the true owner (*k*).

When the consideration for a bill is clearly fraudulent, and it is in the hands of a party with notice, the Court will order it to be given up at once. When only a *prima facie* case of fraud is made out, the Court will restrain the negotiation of the bill for a specified time, in order that the question may be tried (*l*).

Where a party sued on a bill sets up the *jus tertii*, *e.g.*,

(*c*) Cf. *Agra Bank v. Leighton* (1866), L. R. 2 Ex. at pp. 64, 65.

(*d*) Cf. *Jackson v. Shanks* (1866), 12 Jur. N. S. 917.

(*e*) *Whistler v. Forster* (1863), 14 C. B. N. S. at p. 258; 32 L. J. C. P. at p. 163.

(*f*) *Wienholt v. Spitta* (1813), 3 Camp. 376; *Dawes v. Harness* (1875), L. R. 10 C. P. 166.

(*g*) As to duress, *Duncan v. Scott* (1807), 1 Camp. 100 (*onus probandi*); *Kearns v. Durell* (1848), 6 C. B. 596; *Société Anonyme des Hôtels v. Hawker* (1913), 29 T. L. R. 578 (cheque given to hotel keeper in France under threat of prosecution); *White v. Heylman* (1859), 34 Pennsylv. R. 143; *Loomis v. Ruck* (1874), 56 New York R. 462.

(*h*) *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63; cf. sect. 21 (2), *ante*.

(*i*) *Jones v. Gordon* (1877), 2 App. Cas. 616, H. L.

(*k*) *Ibid.*; *Lloyd v. Howard*, *supra*; *Alsager v. Close* (1842), 10 M. & W. 576.

(*l*) *Joyce on Injunctions*, p. 369; and see *Jones v. Lane* (1829), 3 Y. & C. at p. 293; *Seton on Decrees*, ed. 7, p. 712.

if the acceptor when sued by an indorsee sets up that the indorsee obtained the bill by fraud from his immediate indorser, it seems the nature of the fraud must also be looked at. If the indorser never intended by his indorsement to pass the property in the bill to the indorsee, the *jus tertii* alone is a good defence (*m*); but if the indorser intended to pass the property in the bill to the indorsee, though he was induced to do so by fraud, it seems the acceptor must go on to show that the indorser has disaffirmed the transaction (*n*), for fraud renders a contract voidable, not void.

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Rule 6. Illegality of consideration, total or partial, is a defence against an immediate party, but not against a holder in due course (*o*). Illegal consideration.

The consideration for a bill is illegal when it is wholly or in part immoral, contrary to public policy, or forbidden by statute (*p*). For example:

1. Bill accepted for value. The drawer indorses to C. for an illegal consideration, *e.g.*, to stifle a prosecution for felony. C. can, it seems, sue the acceptor (*q*), but not the drawer.

2. X. embezzles the money of a building society. His wife and brother give promissory notes to the society for the amount, on the implied condition that he shall not be prosecuted. The notes are given on an illegal consideration, and cannot be enforced (*r*).

3. Note made for value. The payee indorses it for an illegal consideration to D. D. can, it seems, sue the maker, but not the indorser (*s*).

4. Note made payable to an officer of an unregistered loan society, formed after the Companies Act, 1862, the consideration being a loan by the society. The officer indorses the note to his successor. The society consists of

(*m*) *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63.

(*n*) *Dawes v. Harness* (1875), L. R. 10 C. P. 166. So held in America, *Froutz v. Roberts* (1850), 69 Massachus. R. 19; *Carrier v. Sears* (1862), 86 Massachus. 336.

(*o*) *Hay v. Ayling* (1851), 16 Q. B. at p. 431.

(*p*) Cf. *Fitch v. Jones* (1855), 5 E. & B. 238.

(*q*) *Flower v. Sadler* (1882), 10 Q. B. D. 572, C. A.

(*r*) *Jones v. Merionethshire Building Society*, (1892) 1 Ch. 173, C. A.

(*s*) *Armstrong v. Gibson* (1872), 11 Amer. R. 599.

§ 30. more than twenty members, and is therefore illegal. The indorsee cannot sue the maker (*t*).

5. Note given by defendant to plaintiff in payment of a composition of 5*s.* in the £. It appears that the plaintiff was induced to assent to the composition by the defendant, unknown to the other creditors, indorsing to him the acceptance of a third person. This fraudulent preference is a good defence to an action on the note (*u*).

6. A promissory note given to secure the same sum as a bill of sale, and at the same time, may be valid, though the bill of sale may be void, for not referring to the note as a ground of defeasance (*x*).

7. Note given by defendant to C. in respect of gambling transactions on the Stock Exchange. C. indorses the note for value to the plaintiff, who has notice of the facts. The original consideration being merely void under 8 & 9 Vict. c. 109, s. 18, and not illegal, the plaintiff can recover on the note (*y*).

8. B., having lost money on a horse race, borrows money from C. wherewith to pay the debt, and gives C. a promissory note for the amount so advanced. If B. becomes bankrupt, C. can prove on the note for money lent (*z*).

9. A., having lost money to C. in respect of bets made on a horse race, draws a cheque in C.'s favour for the amount. C. indorses the cheque for value to D., who has notice of the facts. D. cannot recover on this cheque, for it was given for an illegal consideration within the meaning of 5 & 6 Will. 4, c. 41, s. 1 (*a*).

10. Cheque given in Algiers on London by an Englishman for money borrowed in order to pay losses at baccarat, an illegal game in England. Baccarat is not an illegal game according to French law. The legality of the cheque must be determined by English law, and the payee cannot

(*t*) *Shaw v. Benson* (1883), 11 Q. B. D. 563, C. A. As to a company or society formed before 1862, see *Shaw v. Simmons* (1883), 12 Q. B. D. 117; and as to effect of illegal society subsequently registering, see *Ex parte Poppleton* (1885), 14 Q. B. D. 379.

(*u*) *Howden v. Haigh* (1840), 10 A. & E. 1033.

(*x*) *Monetary Advance Co. v. Cater* (1888), 20 Q. B. D. 785.

(*y*) *Lilley v. Rankin* (1887), 56 L. J. Q. B. 248.

(*z*) *Ex parte Pyke* (1878), 8 Ch. D. 754, C. A.

(*a*) *Woolf v. Hamilton*, (1898) 2 Q. B. 337, C. A. (horse racing is a "game" within the meaning of the 9 Anne, c. 19, and 5 & 6 Will. 4, c. 41).

recover (b), but it seems that the payee can recover in an action on the consideration (c).

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11. A stockbroker draws a cheque, leaving the payee's name in blank. His clerk steals the cheque, and fills it up by inserting the name of C., a book-maker, as payee, and gives it to C. in payment of bets. If C. cashes the cheque, the drawer can recover the amount from him (d).

Although the party sued may in many instances set up the *jus tertii*, the cases cited served to show that he cannot set up the *injuria tertii* as a defence. A proceeding prohibited by statute must be distinguished from a proceeding which is merely unauthorized (e).

As regards relief in equity, *e.g.*, by an order for the delivery up and cancellation of the instrument, Lindley, L. J., says: "A plaintiff is not entitled to relief in equity on the ground of the illegality of his own conduct. In order to obtain relief, he must prove, not only that the transaction is illegal, he must prove also either pressure or undue influence" (f).

When old cases are referred to, it is important to notice whether the consideration was simply void, or illegal and void, or whether it was a consideration which by statute expressly made the bill void. Again, an illegal consideration must be distinguished from a merely void consideration (g).

Rule 7. When a bill is given for a consideration which by statute expressly makes it void, it is, as against the party who gave it, void in the hands of all parties whether immediate or remote (h). For example:

Bills void by statute.

A. draws a bill on B. payable to his own order. B. accepts it for a consideration which by statute avoids it.

(b) *Moulis v. Owen*, (1907) 1 K. B. 746, C. A., Moulton, L.J., dissenting.

(c) *Saxby v. Fulton*, (1909) 2 K. B. 208, C. A.

(d) *Paine v. Bevan* (1914), 30 T. L. R. 395.

(e) *Re Coltman* (1881), 19 Ch. D. 64, C. A.

(f) *Jones v. Merionethshire Building Society*, (1892) 1 Ch. at p. 182, C. A.

(g) *Fitch v. Jones* (1855), 5 E. & B. 238; and *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

(h) *Edwards v. Dick* (1821), 4 B. & Ald. 212; *Shillito v. Theed* (1831), 7 Bing. 405, decided on 9 Anne, c. 19, before the passing of 5 & 6 Will. 4, c. 41.

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A. indorses it to C., who takes it for value and without notice. C. can sue A. (*i*), but he cannot sue B. (*j*).

Most, if not all, the statutes which expressly avoided bills are now repealed, *e.g.*, the laws relating to usury and stock-jobbing. By the Gaming Act, 1710 (9 Anne, c. 19), bills or notes given for money won by "gaming or playing at cards, tables, dice, tennis, bowles or other game or games, or by betting on the sides or hands of such as do game at the same" are made void; but by the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), such bills or notes are no longer to be void, but are to be deemed to have been given for an illegal consideration, and money paid thereon is to be recoverable as a debt (*k*). By the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 19, all contracts by way of gaming and wagering are made null and void. The result is that bills or notes which come within the purview of 9 Anne, c. 19, must be dealt with as given for an *illegal* consideration, while bills or notes arising out of other gaming or wagering transactions are deemed merely to be given for a *void* consideration (*l*).

The Gaming Act, 1892 (55 & 56 Vict. c. 9), makes null and void any promise to pay any person any money paid by him in respect of any contract rendered void by the Act of 1845 (*ll*).

If any part of the consideration is illegal, the holder (not being a holder in due course) cannot recover on the instrument (*m*).

As regards card games, at any rate, the law in Scotland is similar to the law in England (*n*).

As to trading with the enemy, see *ante*, p. 73.

(*i*) *Edwards v. Dick* (1821), 4 B. & Ald. 212.

(*j*) *Ibid.*; *Reed v. Wiggins* (1862), 13 C. B. N. S. 220; 32 L. J. C. P. 131.

(*k*) For limits of this latter provision, see *Crawley v. White* (1898), 78 L. T. N. S. 167.

(*l*) *Lilley v. Rankin* (1887), 56 L. J. Q. B. 248 (gambling on Stock Exchange).

(*ll*) See, *e.g.*, *Saffery v. Meyer*, (1901) 1 K. B. 11, C. A.

(*m*) Cf. *Moulis v. Owen*, (1907) 1 K. B. at p. 753, C. A.

(*n*) *Tyler v. Maxwell* (1892), 30 Sc. L. R. 583, 584.

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Negotiation of Bills.

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill (*o*). Negotiation defined.

See "holder" and "issue" defined by sect. 2, *ante*. See the negotiation of a bill or note distinguished from the sale of goods, by Holroyd, J. (*p*), the transfer of shares in a company, by Byles, J. (*q*), and the transfer of an assignable Scotch bond, by Blackburn, J. (*r*); and see note to sub-sect. (3).

(2) A bill payable to bearer is negotiated by delivery. Bill to bearer.

See "bearer" and "delivery" defined by sect. 2. As to delivery for a special purpose, see sect. 21, *ante*. By sect. 8 (3), *ante*, a bill is payable to bearer which is expressed to be so payable, or on which the only or *last* indorsement is an indorsement in blank.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery. Bill to order.

As to indorsement, see sect. 2 and sect. 32. By sect. 8 (4), *ante*, a bill is payable to order which is expressed to be so payable, or which is expressed to be pay-

(*o*) Cf. New York Negotiable Instruments Law, § 60; *Lloyd's Bank v. Cooke*, (1907) 1 K. B. at p. 808, C. A.

(*p*) *Wookey v. Pole* (1820), 4 B. & Ald. at p. 10, comparing them with money.

(*q*) *Swan v. N. B. Australasian Co.* (1863), 2 H. & C. at pp. 184, 185; 32 L. J. Ex. 273.

(*r*) *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. at p. 381.

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able to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable. As to restrictive indorsements, see sect. 35, *post*. An individual who personates the holder, or who makes title through a forged indorsement, is not the holder (s).

The nature of negotiation is thus described by Lord (then Mr. Justice) Blackburn:—"In the notes to *Miller v. Race* (t), where all the authorities are collected, the very learned author says: 'It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt.' Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a *genuine* indorsement, or, where it is payable to bearer, by delivery, becomes holder, may sue in his own name on the contract, and if he is a *bonâ fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it" (u).

In Scotland "indorsement carries the bill only, but leaves untransmitted the diligence which may have been raised on it, and has no effect in transferring dividends due on the bill out of a sequestrated estate, or any guarantee or other collateral obligation or security." *Bell's Principles*, 9th ed. § 331.

(s) Sect. 24; cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at pp. 295, 296; and see note, *ante*, p. 82.

(t) 1 Smith, L. C. ed. 12, p. 525.

(u) *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. 374, at p. 381.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill (*x*), and the transferee in addition acquires the right to have the indorsement of the transferor (*y*). § 31.

Transfer of
bill to order
without
indorsement.

ILLUSTRATIONS.

1. The holder of a bill payable to order transfers it to D. for value without indorsing it. D. cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E. (*z*).

2. The drawer of an accepted bill, payable to drawer's order, discounts it with C., but by mistake omits to indorse it. C. indorses the bill in blank in the drawer's name. He cannot recover from the acceptor, for he had no right to indorse (*a*), but the drawer could be compelled to indorse (*b*).

3. C., the holder of a bill payable to order, transfers it for value to D. without indorsing it. If C. becomes bankrupt, the Court will compel his trustee in bankruptcy to indorse the bill (*c*). If C. dies, the Court will compel his executor or administrator to indorse (*d*).

4. The drawer of an accepted bill payable to drawer's order transfers it for value to C. without indorsing it. C. returns the bill to the drawer for his indorsement. The drawer destroys it. C. has no claim against the acceptor (*e*).

5. The payee of a bill payable to his order deposits it in June as security with X., but without indorsing it. In July he is restrained by injunction from negotiating the bill. In October

(*x*) *Whistler v. Forster* (1863), 14 C. B. N. S. at p. 258; 32 L. J. C. P. at p. 163, per Willes, J.; *Ex parte Pike* (1879), 40 L. T. N. S. 529; New York Negotiable Instruments Law, § 79.

(*y*) *Harrop v. Fisher* (1861), 10 C. B. N. S. at p. 203; 30 L. J. C. P. at p. 286, per Byles, J. As to an express promise to indorse which was held not to create a mutual credit, see *Rose v. Sims* (1830), 1 B. & Ad. 521. As to enforcement of order by Court to indorse, see sect. 14 of the Judicature Act, 1884, *post*, p. 393.

(*z*) *Harrop v. Fisher* (1861), 10 C. B. N. S. at p. 203, Byles, J.; and *Cunliffe v. Whitehead* (1837), 3 Bing. N. C. at p. 830.

(*a*) *Harrop v. Fisher* (1861), 10 C. B. N. S. 196; 30 L. J. C. P. 283.

(*b*) *Walters v. Neary* (1904), 21 T. L. R. 146.

(*c*) *Ex parte Mowbray* (1820), 1 Jac. & W. 428. Indorsement should negative personal liability. Indorsement by bankrupt is, it seems, equally good: *Ex parte Rhodes* (1837), 3 Mont. & Ayr. 217.

(*d*) Cf. *Watkins v. Maule* (1820), 2 Jac. & W. 243.

(*e*) *Edge v. Bumford* (1862), 31 L. J. Ch. 805.

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he gives X. his indorsement. This is a negotiation of the bill and a breach of the injunction (*f*).

It is to be noted that when indorsement is subsequently obtained, the transfer takes effect as a negotiation from the time when the indorsement is given (*g*). The scope of the rule is thus explained by Willes, J., who says: "The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is over-due, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action; and it is therefore clear that in order to acquire the benefit of this rule the holder must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better title than his assignor" (*h*).

Indorsement
by repre-
sentative.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability (*i*).

See sect. 16 (1), *ante*, as to indorsements limiting or negating liability, and sect. 26, *ante*, as to indorsements in a representative capacity.

(*f*) *Day v. Longhurst* (1893), 62 L. J. Ch. 334.

(*g*) *Whistler v. Forster* (1863), 14 C. B. N. S. 248; see, too, *Lancaster Bank v. Taylor* (1869), 1 Amer. R. 71; *Clark v. Whitaker* (1871), 9 Amer. R. 286; New York Negotiable Instruments Law, § 79, and cases cited in *Crawford's* edition.

(*h*) *Whistler v. Forster* (1863), 14 C. B. N. S. at pp. 257, 258; 32 L. J. C. P. p. 163.

(*i*) New York Negotiable Instruments Law, § 74.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely :—

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Requisites of
a valid
indorsement.

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient (*k*).

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

Allonge or
"copy."

ILLUSTRATIONS.

1. C., the holder of a bill, signs it and writes thereon, "I hereby assign this draft and all benefit of the money secured thereby to D." This is an indorsement by C. (*l*).

2. C., the holder of a note, signs it and writes thereon, "I bequeath—Pay the within to D., or his order, at my death," and gives it to D. This is not an indorsement, but an attempted testamentary gift, invalid under the Wills Act (*m*).

3. An express promise in writing to indorse a bill is not an indorsement (*n*).

4. The assignment of a note by a separate writing is not an indorsement (*o*).

By sect. 2 "indorsement" means an indorsement completed by delivery. As to delivery, see sect. 21, *ante*. As to negotiation, see sect. 31. As to signature by agent, see sect. 91, *post*. As to indorsement of bill drawn in a set, see sect. 71, *post*.

It has been held that where a bill broker who has discounted bills re-discounts them with his bankers, and instead of indorsing each bill gives a general guarantee, he can prove against the acceptor for the amount he has to

(*k*) New York Negotiable Instruments Law, § 61.

(*l*) *Richards v. Frankum* (1840), 9 C. & P. at p. 225.

(*m*) *Mitchell v. Smith* (1864), 33 L. J. Ch. 596.

(*n*) Cf. *Harrop v. Fisher* (1861), 10 C. B. N. S. at p. 204; 30 L. J. C. P. 286, and *Rose v. Sims* (1830), 1 B. & Ad. 521.

(*o*) *Re Barrington* (1804), 2 Scho. & Lef. 112; cf. *Ex parte Harrison* (1789), 2 Brown C. C. 614.

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pay under his guarantee and interest, if the bills are dishonoured (*p*).

An indorsement on the face of a bill is valid (*q*).

When there is no room on a bill for further indorsements, a slip of paper, called an "allonge," may be attached thereto. It becomes part of the bill, and indorsements may be written thereon (*r*).

Some of the foreign codes contain minute provisions to prevent frauds, *e.g.*, that the first indorsement on the allonge must begin on the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another: cf. *Nouguier*, § 668.

As to "copies," see *Nouguier*, §§ 208—211, and German Exchange Law, Arts. 70—72. A "copy" of a bill must be distinguished from the parts of a set: see sect. 71, *post*, p. 273.

Partial
indorsement.

- (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill (*s*).

ILLUSTRATIONS.

1. C., the holder of a bill for 100*l.*, indorses it, "Pay 50*l.* to D. or order, and 50*l.* to E. or order." This is invalid. Neither D. nor E. can sue or further indorse (*t*).

2. C., the holder of a bill for 100*l.*, indorses it, "Pay D. or order 30*l.*" This is invalid, unless C. also acknowledge the receipt of 70*l.* (*u*).

(*p*) *Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.

(*q*) *Young v. Glover* (1857), 3 Jur. N. S. Q. B. 637; *Ex parte Yates* (1858), 2 De G. & J. 191; 27 L. J. Bank. 9.

(*r*) Cf. *Monmohunee v. Secretary of State* (1874), 13 Bengal L. R. 359. Cf. New York Negotiable Instruments Law, § 61, and cases cited in *Crawford's* edition.

(*s*) Cf. New York Negotiable Instruments Law, § 62, which repeats this sub-section, and adds that "where the instrument has been paid in part, it may be indorsed as to the residue."

(*t*) Cf. *Heilbut v. Nevill* (1869), L. R. 4 C. P. at p. 358; *Conover v. Earl* (1868), 26 Iowa, 169. See *Nouguier*, § 665.

(*u*) *Hawkins v. Cardy* (1699), 1 Ld. Raym. 360.

A partial indorsement, purporting to split the right of action on a bill, is invalid as a negotiation, but may operate as an authority to receive payment of the amount thereby specified (*v*). § 32.

- (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others (*x*). Several payees or indorsees.

ILLUSTRATIONS.

1. Bill payable "to the order of C. and D." D. alone indorses it to E. This is insufficient. E. cannot sue the acceptor (*y*).
2. Bill payable "to the order of C. and D." C. with D.'s authority, indorses it "for self and D." This is sufficient.
3. Bill payable to "C. and D., or the order of either of them." C. alone indorses it. This is sufficient (*z*).

Qu. in Illustration 2, as to the liability of D. as indorser? Where a dividend warrant is payable to the order of two or more persons the custom is to pay on the indorsement of any one of them; and by sect. 97 (3) (*d*), *post*, the usages with respect to dividend warrants are expressly saved.

- (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature (*a*). Misdescription of payee or indorsee.

ILLUSTRATION.

A bill is indorsed to J. Smythe. The man's real name is T.

- (*v*) Cf. *Heilbut v. Nevill* (1869), L. R. 4 C. P. at p. 358; *Conover v. Earl* (1868), 26 Iowa, 169. See *Nouquier*, § 665.
 (*x*) New York Negotiable Instruments Law, § 71.
 (*y*) *Carvick v. Vickery* (1781), 2 Dougl. 652; cf. *Heilbut v. Nevill* (1869), L. R. 4 C. P. at pp. 356, 358, per Willes, J.
 (*z*) *Watson v. Evans* (1863), 32 L. J. Ex. 137.
 (*a*) Cf. New York Negotiable Instruments Law, § 73.

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Smith. He can validly negotiate the bill by indorsing it as J. Smythe (*b*).

The usual and proper course is for the holder to sign first the name as described or spelt in the bill, and then to put underneath his proper signature.

If a person trades under an assumed name, can he validly negotiate a bill payable to him under his trade name by indorsing it in his individual name or *vice versa*?—*e.g.*, John Smith trades as “Brown and Co.” A bill is drawn payable to the order of “Brown and Co.” He indorses it as John Smith. Is the presentment for payment of this bill by the indorsee a due presentment? In Massachusetts it seems it is (*c*). The point was raised in *Walker v. Macdonald* (*d*), but the decision proceeded on the ground that there was a prior indorsement in blank, and therefore the bill was payable to bearer. Such an indorsement is clearly irregular, if not invalid (*e*).

A question sometimes arises as to how a bill payable (say) to “Mrs. John Jones” should be indorsed. The proper form appears to be “Ellen Jones, the wife of John Jones.” The form sometimes adopted, *viz.*, “Mrs. John Jones,” is clearly irregular, though perhaps not invalid: see note to sect. 91, *post*.

When the title to a bill payable to order is transmitted by act of law, and the person to whom the title is transmitted obtains possession of the bill, he has the rights of the holder. See transmission by marriage (*post*, p. 147), death (*post*, p. 147), execution (*post*, p. 148), bankruptcy (*post*, p. 148). See also dissolution of partnership (*ante*, p. 81). In America an exception to the general rule is admitted in the case of corporations. Thus a bill payable to the order of the cashier or other officer of a bank is deemed to be payable to the bank; therefore, any person who can indorse for the bank can negotiate such a bill—*e.g.*, C. is the cashier of the “X. Bank,” and D. is the

(*b*) *Watson v. Evans* (1863), 32 L. J. Ex. 137; and cf. *Willis v. Barrett* (1816), 2 Stark. 29; cf. sect. 7 (1), *ante*.

(*c*) *Bryant v. Eastman* (1851), 61 Mass. R. 111.

(*d*) *Walker v. Macdonald* (1848), 2 Exch. 527.

(*e*) Cf. *Bank of Montreal v. Exhibit Trading Co.* (1906), 11 Com. Cas. 250, note made payable to an unincorporated company. After incorporation the note is indorsed by the company. The indorsement is irregular.

president. A bill bought by the bank is indorsed "pay to the order of C. cashier." The "X. Bank" can sue on the bill in the corporate name, and D. the president can validly indorse it away without a previous indorsement by C. (f). The expediency of this exception is doubtful, but it has been adopted by § 72 of the New York Negotiable Instruments Law.

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(5) Where there are two or more indorsements on a bill each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. Order of indorsements.

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive. Kinds of indorsement.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (g). Conditional indorsement.

ILLUSTRATION.

An indorsement running, Pay to the order of C. "on the arrival of the ship *Swallow* at Calcutta," or "on his marriage with D.," would be conditional. See sect. 11 (2).

Compare sect. 35, *post*, as to restrictive indorsements. This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled (h). This was hard on him. If he dishonoured the bill he might be liable in damages, and yet it might be impossible for him to find out if the condition had been fulfilled.

(f) *Watervliet Bank v. White*, 1 Denio, 609; *First Nat. Bank v. Hall* (1871), 44 New York R. 395.

(g) Cf. New York Negotiable Instruments Law, § 69, which further provides that "any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally."

(h) *Robertson v. Kensington* (1811), 4 Taunt. 30.

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Under this section, as between indorser and indorsee the condition would presumably be operative. If the indorsee received payment without the condition being fulfilled, he could not sue the indorser, and he would moreover hold the proceeds in trust for the indorser. The continental codes do not recognise conditional indorsements. Sect. 52 of the Indian Negotiable Instruments Act, 1881, appears to preserve the common law rule.

Indorsement
in blank.

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

ILLUSTRATION.

Bill payable to the order of John Smith. He signs on the back, "John Smith." This act is interpreted by the law merchant as an indorsement in blank by John Smith, and operates as if he had written—1. I hereby assign this bill to bearer. 2. I hereby undertake that if this bill be dishonoured, I will indemnify the bearer, on receiving due notice thereof.

By sect. 31 (2), *ante*, a bill payable to bearer is negotiated by delivery (i).

Under French Code, Arts. 137, 138, an indorsement in blank merely operates as a "procuration," and not as a negotiation of the bill. The indorsee is considered as the agent, or "mandataire," of the indorser, and their relations are regulated accordingly. If, however, the indorsee has given value, he may convert the blank into a special indorsement (k).

Special
indorsement.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

ILLUSTRATIONS.

1. "Pay D. or order."
2. "Pay to D. & Co.," which in legal effect is "Pay D. & Co. or order." See sect. 8 (4).

(i) See *Peacock v. Rhodes* (1781), 2 Dougl. at p. 636, per Lord Mansfield; and see indorsement in blank distinguished from special indorsement, per Wilde, C.J., *Harmer v. Steele* (1849), 4 Exch. at p. 15; per Parke, B., *Robarts v. Tucker* (1851), 16 Q. B. at p. 579; and per Erle, C.J., *Law v. Parnell* (1859), 7 C. B. N. S. at p. 285; 29 L. J. C. P. at p. 19.

(k) *Nougier*, §§ 747—760; and see *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 473, Ex. Ch.

3. "Pay to the order of the D. Company," which in legal effect is "Pay the D. Company or order" (*l*).

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A bill specially indorsed is payable to the indorsee therein designated, and can only be negotiated by his indorsement (*m*). Under sect. 8 (3), *ante*, a special indorsement following an indorsement in blank controls the effect of the indorsement in blank.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

Provisions as to payee apply to indorsee.

See sects. 7 and 8, *ante*, as to payee.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill or to the order of himself or some other person (*n*).

Conversion of blank into special indorsement.

ILLUSTRATION.

The holder of a bill, indorsed by C. in blank, writes over C.'s signature the words, "Pay to the order of D." The holder who does this is not liable as an indorser, but the transaction operates as a special indorsement from C. to D. (*o*).

Striking out Indorsements.—The holder may at any time (*e.g.*, at the trial after the plaintiff has finished his case. (*p*)) strike out any indorsement which is not necessary to his title. The indorser, whose indorsement is intentionally struck out, and all indorsers subsequent to him, are discharged from their liabilities; *aliter* if the indorse-

Striking out indorsements.

(*l*) *Soares v. Glyn* (1845), 8 Q. B. 24, Ex. Ch. See sect. 8 (5).

(*m*) See sect. 31 (3); and *Harrop v. Fisher* (1861), 30 L. J. C. P. 283.

(*n*) Cf. New York Negotiable Instruments Law, § 65.

(*o*) *Vincent v. Horlock* (1808), 1 Camp. 442; cf. *Hirschfield v. Smith* (1866), L. R. 1 C. P. 340; German Exchange Law, Art. 12; and *Nouguier*, §§ 747, 748.

(*p*) *Mayer v. Jadis* (1833), 1 M. & Rob. 247; *Byles*, 154.

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ment be struck out by mistake (*q*). *Qu.* if the present system of open pleading affects the necessity for striking out indorsements where the action is against the acceptor? The holder may, in some cases, make title through a person whose indorsement is struck out (*r*). Indorsements for collection may be struck out by the owner of the bill (*s*), and if the indorser of a bill takes it up or pays it when dishonoured, he may strike out his own and all subsequent indorsements, whether blank or special (*t*).

Restrictive
indorsement.

35. (1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection" (*u*).

ILLUSTRATIONS.

The following are restrictive:—

1. "Pay D. or order for the use of X." (*x*).
2. "Pray pay the money to my use" (*y*).
3. "Pay the contents to my servant for my use" (*z*).
4. "The within must be credited to D., value in account" (*a*).
5. "Pay the contents to my use," or "Pay the contents to the use of X.," or "Carry this bill to the credit of X." (*b*).
6. "Pay D. or order for our use, value received in account" (*c*).

(*q*) *Wilkinson v. Johnson* (1824), 3 B. & C. 428; cf. New York Negotiable Instruments Law, § 78, which embodies this statement.

(*r*) *Fairclough v. Pavia* (1854), 9 Exch. at p. 695; but cf. *Bartlett v. Benson* (1845), 14 M. & W. 733.

(*s*) *Dugan v. United States* (1818), 3 Wheat. 173; *Bank of Utica v. Smith* (1820), 18 Johns. 229, New York.

(*t*) *Callow v. Lawrence* (1814), 3 M. & S. 95; German Exchange Law, Art. 55. See also sect. 59 (2), *post*.

(*u*) Cf. New York Negotiable Instruments Law, § 63, and cases cited in *Crawford's* edition.

(*x*) *Evans v. Cramlington* (1687), 1 Show. 4; 2 Show. 509, Ex. Ch.

(*y*) *Snee v. Prescott* (1743), 1 Atk. at p. 249.

(*z*) *Edie v. East India Co.* (1761), 2 Burr. at p. 1227, Wilmot, J.

(*a*) *Ancher v. Bank of England* (1781), 2 Dougl. 637.

(*b*) Cf. *Rice v. Stearns* (1807), 3 Mass. R. at p. 226.

(*c*) *Wilson v. Holmes* (1809), 5 Mass. R. 543.

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7. "Pay D. or order for the account of X." (*d*).
8. "Pay D. or order for my use" (*e*).
9. "Pay to the order of D. & Co., under provision for my note in favour of X." (*f*).
10. "Pay D. & Co. or order for collection" (*g*).

A statement in an indorsement that the value for it has been furnished by some person other than the indorsee does not make it restrictive (*h*); *e.g.*, Bill indorsed "Pay D., or order value in account with X." This is not restrictive. It is in effect a simple indorsement to D. or order (*i*).

The mere omission to add words of negotiability to a special indorsement does not make it restrictive: see sect. 8 (1) and (4), *ante*.

In an unreported case a bill indorsed in Germany "für mich, &c.," was held to be restrictive, as being an indorsement "for my account," but it was afterwards agreed that this was a mis-translation, and that the words meant merely "as for me," and were not restrictive (*k*).

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that the indorser could have sued (*l*), but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so (*m*).

Restrictive
indorsement.

(*d*) *Treuttel v. Barandon* (1817), 8 Taunt. 100; *Blaine v. Bourne* (1875), 23 Amer. R. 431. But as to a cheque crossed "for account payee," see *National Bank v. Silke* (1890), 1 Q. B. 439.

(*e*) *Sigourney v. Lloyd* (1828), 8 B. & C. 622; affirmed, 5 Bing. 525, Ex. Ch.

(*f*) *Wedlake v. Hurley* (1830), Lloyd & Welsby, 330; 1 C. & J. 83.

(*g*) *Sweeney v. Easter* (1863), 1 Wallace, 166, Sup. Ct. U. S.; *Merchants' Bank v. Henson* (1884), 53 Amer. R. 5; *Williams, Deacon & Co. v. Shadbolt* (1885), 1 C. & E. 529; cf. German Exchange Law, Art. 17.

(*h*) *Potts v. Reed* (1806), 6 Esp. 57; *Murrow v. Stuart* (1853), 8 Moore, P. C. 267.

(*i*) *Buckley v. Jackson* (1868), L. R. 3 Ex. 135.

(*k*) *Haarblicker v. Baerselmann* (1914), Times, 14th October.

(*l*) *Evans v. Cramlington* (1687), 2 Show. 509, Ex. Ch.; *Wilson v. Holmes* (1809), 5 Massachus. R. 543; cf. German Exchange Law, Art. 17.

(*m*) *Lloyd v. Sigourney* (1829), 5 Bing. at p. 532, Ex. Ch.; cf. *Pothier*, No. 89; German Exchange Law, Art. 17; New York Negotiable Instruments Law, § 67.

§ 35.

ILLUSTRATIONS.

1. Bill indorsed "Pay D. for my account." D. cannot by indorsing it to E. authorize E. to collect it. *Aliter* if the indorsement ran, "Pay D. or order for my account" (*n*).

2. Bill indorsed "Pay D. or order for collection per account of C. Bank." If the C. Bank receives payment before maturity, D. cannot recover from the acceptor, although he has credited the C. Bank with the amount of the bill (*o*).

It has never been attempted to make the payer responsible for the due application of the proceeds by the indorsee, and it is clear that he is not responsible.

(3) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement (*p*).

ILLUSTRATIONS.

1. C. indorses a bill "Pay D. or order for my use." D. indorses it to, and discounts it with, E. on his own account. E. collects it at maturity. C. can recover the amount of the bill from E. (*q*).

2. C. indorses a bill "Pay D. or order for the use of X." D. collects the bill at maturity. If he misappropriate the money. X. cannot sue him (*r*). The action must be brought by C. (*s*).

3. C. indorses a bill "Pay D. or order for account of X." D. is X.'s agent. D. indorses the bill to E., who collects it. X. can sue E. for the amount so received (*t*).

4. A. draws a bill on B., and indorses it to C. C. indorses it, "Pay D. or order for my use." The bill is dishonoured, and D. sues A. the drawer. If A. have any defence against C. he may set it up against D. (*u*).

(*n*) *Lloyd v. Sigourney* (1829), 5 Bing. at p. 532.

(*o*) *Williams, Deacon & Co. v. Shadbolt* (1885), 1 C. & E. 529, per Cave, J.

(*p*) *Trentell v. Barandon* (1817), 8 Taunt. 100; *Lloyd v. Sigourney* (1829), 5 Bing. at p. 531; *Sweeney v. Easter* (1863), 1 Wallace, R. 166, Sup. Ct. U. S.; German Exchange Law, Art. 17; New York Negotiable Instruments Law, § 67.

(*q*) *Lloyd v. Sigourney* (1829), 5 Bing. 525, Ex. Ch.

(*r*) *Wedlake v. Hurley* (1830), Lloyd & Welsby, 330; 1 C. & J. 83.

(*s*) *Ibid.* at pp. 332, 88, per Vaughan, B.

(*t*) *Trentell v. Barandon* (1817), 8 Taunt. 100. If D. had not been X.'s agent, C. must have brought the action.

(*u*) *Wilson v. Holmes* (1809), 5 Mass. R. 543.

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Where a bill is indorsed restrictively the relations between indorser and indorsee are substantially those of principal and agent (*x*). If, for instance, the acceptor pay the indorser, it seems that the indorsee cannot sue him, though the indorsee really gave value for the bill (*y*). The indorsee is frequently referred to in the cases as a trustee, but he is only a trustee in the sense that an agent or bailee is a trustee (*z*). German Exchange Law, Art. 17, deals with agency or restrictive indorsements and accords substantially with this section; so, too, does sect. 50 of the Indian Act. In France the mere omission of the statement of the value received makes the indorsement operate as a procuration or agency indorsement (*a*). *Pothier* (Nos. 23 and 88—90) has worked out the results with great clearness.

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

How long
bill continues
negotiable.

"A bill of exchange," says Lord Ellenborough, in language a little too wide, "is negotiable *ad infinitum* until it has been paid by, or discharged on behalf of, the acceptor" (*b*). See sects. 59—64 and 68 as to discharges, and sect. 35 (2) as to restrictive indorsements. The character and incidents of negotiability depend on the time of negotiation. As to negotiation, see sect. 31. As to transfer of an incomplete bill, see sect. 20, *ante*.

The fact that an action has been brought on a dishonoured bill does not determine its negotiability; but

After action
brought.

(*x*) Cf. *Potts v. Reed* (1806), 6 Esp. at p. 59; *Rice v. Stearns* (1807), 3 Massachusetts R. at p. 532.

(*y*) *Williams, Deacon & Co. v. Shadbolt* (1885), 1 C. & E. 529, Cave, J.

(*z*) Cf. *Cook v. Lister* (1863), 13 C. B. N. S. at p. 597; 32 L. J. C. P. 121; see the position of an agent or bailee compared with a trustee, strictly so called, by Jessel, M.R., in *Re Hallett's Estate* (1879), 13 Ch. D. at pp. 708—711, C. A.

(*a*) Cf. French Code, Art. 138; *Nouguier*, §§ 744 *et seq.*

(*b*) *Callow v. Lawrence* (1814), 3 M. & S. at p. 97; cf. *Leavitt v. Putnam* (1850), 3 New York R. at p. 497; New York Negotiable Instruments Law, § 77.

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if a bill be transferred, after action brought, to embarrass the defendant, his remedy is by application to the Court (c). If judgment were obtained, the bill would be extinguished by merger as between the defendant and the plaintiff or any subsequent party.

Negotiation
of overdue
bill.

(2) When an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

ILLUSTRATIONS.

1. Note payable to C.'s order made for an illegal consideration. C. indorses it, when overdue, to D. D. cannot recover from the maker (d).

2. Bill obtained from the drawer for a special purpose. C., in fraud of that purpose, indorses the bill when overdue to D. D. cannot recover from the acceptor (e).

3. Bill payable to drawer's order is accepted subject to a certain condition then agreed on between drawer and drawee. The drawer indorses the bill when overdue to C. C. takes the bill subject to the agreed condition, though he had no notice of it (f).

4. Bill accepted for an illegal consideration. The drawer indorses it before maturity to C., who takes it for value and without notice. C. indorses the bill when overdue to D. D. can sue all parties, for C. had a good title (g).

5. The holder of a bill is indebted to the acceptor, e.g., for rent. If, then, he sues the acceptor the arrears of rent can be set off; but if he indorses the bill when overdue to D. for value, the acceptor has no right of set-off against D. (h).

6. Action by third indorsee of a bill against the first indorser. Although the plaintiff took the bill when overdue, the defendant

(c) *Deuters v. Townsend* (1864), 33 L. J. Q. B. 301; cf. *Woodward v. Pell* (1868), L. R. 4 Q. B. 55.

(d) *Amory v. Meryweather* (1824), 2 B. & C. 573.

(e) *Lloyd v. Howard* (1850), 15 Q. B. 995; cf. *Redfern v. Rosenthal* (1902), 86 L. T. 855, C. A.

(f) *Holmes v. Kidd* (1858), 28 L. J. Ex. 112, Ex. Ch.

(g) *Chalmers v. Lanion* (1808), 1 Camp. 383; *Fairclough v. Paria* (1854), 9 Exch. 690; cf. sect. 29 (3), *ante*.

(h) *Oulds v. Harrison* (1854), 10 Exch. 572; *Ex parte Swan* (1868), L. R. 6 Eq. 344. The indorsement of a bill, in this respect, differs from the ordinary assignment of a chose in action: *Roxburghe v. Cox* (1880), 17 Ch. D. 520, C. A.

cannot set-off a debt due to him from an intermediate holder and indorser (*i*).

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7. The indorsee of a note sues the maker. The maker may show that the note had been satisfied as between himself and the payee, and that the payee indorsed the note to the plaintiff when it was overdue, and after satisfaction to the payee (*k*).

8. The manager of the "X. Bank" abstracts moneys belonging to the bank, and purchases therewith an overdue bill of exchange, which he negotiates to D. The "X. Bank," and not D. is entitled to the bill, and can prove against the acceptor's estate if he become bankrupt (*l*).

9. A bill payable three months after date is accepted to accommodate the drawer. After the bill is overdue the drawer indorses to C. for value. C. can recover from the acceptor (*m*).

10. A bill of exchange, indorsed in blank, is handed in Norway to S., who is agent for C. and D., and who was jointly interested in the bill. The bill is seized in Norway for a debt of D.'s, and, after it is overdue, is sold to F. The proceedings are regular according to Norwegian law. F. has a good title to the bill as against C. (*n*).

As to the term "negotiation," see sect. 31 (1), *ante*, and as to the term "defect of title," see sect. 29 (2), *ante*. It was substituted for the equivalent expression "equity attaching to the bill," as that term was unknown in Scotch law. "If," says Buller, J., "a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. . . . But where a note is due the party receiving it takes it on the credit of the person who gives it to him" (*o*).

After long controversy it now seems settled that mere absence of consideration is not an equity which attaches to a bill (*p*), but that if there be an agreement express or implied not to negotiate an accommodation bill after maturity, the agreement constitutes an equity attaching

(*i*) *Whitehead v. Walker* (1842), 10 M. & W. 696.

(*k*) *Brown v. Davies* (1789), 3 T. R. 80.

(*l*) *Ex parte Oriental Bank* (1870), L. R. 5 Ch. 358; cf. *Lee v. Zagury* (1817), 8 Taunt. 114; and, by analogy, *Re Gomersall* (1875), 1 Ch. D. 137. As to the limits of the principle that the rights of a person not a party to the bill may constitute an equity attaching to it, see *Warren v. Haigh* (1875), 65 New York R. 171.

(*m*) *Stein v. Yglesias* (1834), 1 C. M. & R. 565.

(*n*) *Alcock v. Smith*, (1892) 1 Ch. 238, C. A.

(*o*) *Brown v. Davies* (1789), 3 T. R. 80, at p. 82.

(*p*) *Sturtevant v. Ford* (1842), 4 M. & Gr. 101; *Ex parte Swan* (1868), L. R. 6 Eq. 344.

§ 36. to it (*q*). In New York it has been held that if an accommodation bill be negotiated when overdue the holder cannot recover, for the bill is in terms a credit for a limited time, and to negotiate it after that time is a breach of faith (*r*).

Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect—they are rather grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper. Part payment, however, may be regarded as an equity which attaches to a bill (*s*). The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two enquiries: 1. Has what ought to have been done really been done, *i.e.*, has the bill in fact been discharged? 2. If not, why not? Is there any equity attaching thereto? *i.e.*, was the *title* of the person who held it at maturity defective? If his title to the instrument was complete, it is immaterial that for some collateral reason, *e.g.*, a set-off, he could not have enforced the bill against some one or more of the parties liable thereon. In France, it seems, no distinction is drawn between overdue and current bills; *Nouguier*, §§ 679, 680. By German Exchange Law, Art. 16, the indorsee of an overdue and protested bill acquires only the rights of the indorser.

When deemed
overdue.

A bill payable otherwise than on demand is overdue after the expiration of the last day of grace (*t*). As to instruments on demand, see sub-sect. (3), and as to dishonoured bills, see sub-sect. (5). By German Exchange Law, Art. 16, a bill is not deemed to be overdue till the time for protesting it has elapsed.

Bills negotiated abroad.—The provisions of this section perhaps do not apply to a bill which is negotiated in a

(*q*) *Parr v. Jewell* (1855), 16 C. B. 684, Ex. Ch.; *Carruthers v. West* (1847), 11 Q. B. 143, is not to the contrary. See *ratio decidendi*, per Wightman, J.

(*r*) *Chester v. Dorr* (1869), 41 New York R. 279.

(*s*) *Graves v. Key* (1832), 3 B. & Ad. at p. 319.

(*t*) Cf. *Lettley v. Mills* (1791), 4 T. R. 170.

foreign country, where no distinction is recognised between overdue and current bills (*u*).

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(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact (*x*).

Bill on demand, when overdue.

See sect. 10, defining what bills are payable on demand. Compare sect. 40 (3), *post*, as to the test of reasonable time.

By sect. 86 (3), *post*, notes payable on demand, which are regarded as continuing securities, are exempted from this sub-section (*y*).

By virtue of sect. 73, *post*, this enactment applies to cheques. Therefore a person who takes a stale cheque, takes it at his peril. In a case in 1881, where the previous decisions are reviewed, a cheque negotiated 8 days after date was held not to be on the footing of an overdue bill (*z*), but a cheque taken 2 months after date has been held to be stale (*a*). Most banks refuse to pay a cheque 6 months old without special orders from their customer, but there seems to be no general practice on this point.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

Presumption as to date of negotiation.

This is declaratory (*b*); but apart from the general rule

(*u*) *Alcock v. Smith*, (1892) 1 Ch. 238, affirmed on the ground that the evidence disclosed no defect of title. See note to sect. 72 (3), *post*.

(*x*) Cf. New York Negotiable Instruments Law, § 92, and cases cited in *Craneford's* edition.

(*y*) *Brooks v. Mitchell* (1841), 9 M. & W. 15.

(*z*) *London and County Bank v. Groome* (1881), 8 Q. B. D. 288; cf. *Rothschild v. Corney* (1829), 9 B. & C. 388, six days.

(*a*) *Serrel v. Derbyshire Railway Co.* (1850), 9 C. B. 811; cf. *E. parte Hughes* (1880), 43 L. T. N. S. 577, as to dishonoured cheques; and *Himmelman v. Hotelling* (1870), 6 Amer. R. 600.

(*b*) *Lewis v. Parker* (1836), 4 A. & E. 838; cf. sect. 30 (2), *anté*, and New York Negotiable Instruments Law, § 75.

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there is no presumption as to the exact time of negotiation (*c*), and it seems that circumstances of strong suspicion, short of direct evidence, may rebut the *primâ facie* presumption, and make it a question for the jury whether the bill was negotiated before or after maturity (*d*).

Bill known
to be dis-
honoured.

(5) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

ILLUSTRATION.

A bill is dishonoured by non-acceptance, and afterwards indorsed by the plaintiff, who knows that it has been so dishonoured. The plaintiff, who is the third indorsee, takes the bill subject to any agreement between the first and second indorsers as to the discharge of the former (*e*).

This sub-section settles a disputed point, by putting a bill known to be dishonoured on the same footing as an overdue bill (*f*). See sect. 29, defining "holder in due course"; and sect. 43, as to dishonour by non-acceptance. In America the decisions are conflicting. As to negotiating a bill after action brought, see note to sub-sect. (1).

Negotiation
of bill to
party already
liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser (*g*), or to the acceptor (*h*), such party may, subject to the provisions

(*c*) *Anderson v. Weston* (1840), 6 Bing. N. C. 296.

(*d*) *Bounsall v. Harrison* (1836), 1 M. & W. 611.

(*e*) *Crossley v. Ham* (1811), 13 East, 498; cf. *Whitehead v. Walker* (1842), 10 M. & W. 696, where the bill was dishonoured by non-acceptance, though it is spoken of as overdue; *Hornby v. McLaren* (1908), 24 T. L. R. 494 (cheque known to have been dishonoured).

(*f*) Affirms *Crossley v. Ham* (1811), 13 East, 498; and *quoad hoc* overrides *Goodman v. Harvey* (1836), 6 Nev. & Man. 372.

(*g*) Cf. sect. 59 (2), *post*.

(*h*) See note to sect. 59 (1), *post*, and sect. 61, *post*.

of this Act (*i*), re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable (*k*).

§ 37.

ILLUSTRATIONS.

1. Bill payable three months after date is indorsed by the holder to the acceptor. At any time before maturity the acceptor may re-issue the bill and indorse it away (*l*).

2. The drawer of a bill payable to drawer's order indorses it to C., who indorses it to D., who indorses it back to the drawer. The drawer, either before or after its maturity, may re-issue the bill and indorse it to E. (*m*).

3. The drawer of a bill payable to drawer's order indorses it for value to C., who indorses it to D., who indorses it back to the drawer. The drawer cannot recover from C. or D., for they in turn could recover from him as drawer (*n*).

4. The payee of a bill indorses it "without recourse" to D., who indorses it to E., who indorses it back to the payee. The payee, in his character of third indorsee, can sue D. and E., for they have no claim against him as a prior indorser (*o*).

5. The drawer of a bill indorses it to C., who has previously undertaken to be responsible for the price of goods supplied to the acceptor. C. indorses the bill back to the drawer. The drawer, in his character of indorsee, can sue C., for C. has no remedy over against him (*p*).

6. C. undertakes to guarantee a debt due from B. to A. B. signs a blank acceptance, which C. indorses. The document is then handed to A., who fills it up as a bill payable to drawer's order, inserting his own name as drawer. C., though an indorser, is liable to A., the drawer on this bill (*q*).

By sect. 36 (1), a bill is negotiable until it is restrictively indorsed or discharged. As to discharges, see

(*i*) See sects. 59—64, as to discharges; and especially sect. 59 (2) as to taking up bills, and sect. 61, as to coincidence of right and liability.

(*k*) Cf. New York Negotiable Instruments Law, § 80, which substitutes "personally" for "previously."

(*l*) *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244.

(*m*) Cf. *Hubbard v. Jackson* (1827), 4 Bing. 390; *Jones v. Broadhurst* (1850), 9 C. B. 173. This is subject to sect. 59 (2), (3).

(*n*) Cf. *Bishop v. Hayward* (1791), 4 T. R. 470; *Wilders v. Stevens* (1846), 15 M. & W. at p. 212.

(*o*) Cf. *Morris v. Walker* (1850), 15 Q. B. at p. 594. There is here no circuity of action.

(*p*) *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636, C. A.

(*q*) *Glenie v. Bruce Smith*, (1908) 1 K. B. 263, C. A.

§ 37. sects. 59- 64, *post*, and note that an accommodation bill is discharged when paid at maturity by the person accommodated, and that any bill is discharged when the acceptor is or becomes the holder of it at or after maturity.

The rule in the present section is a rule against circuitry of action (*r*), and as the cases show, *cessante ratione cessat ipsa lex*.

Rights of the holder.

38. The rights and powers of the holder of a bill are as follows:—

- (1) He may sue on the bill in his own name(*s*):
- (2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill(*t*):
- (3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill(*u*).

This section deals with the rights acquired by negotiation, that is, by transfer according to the form required by the law merchant: see sect. 31, *ante*. See “holder” defined by sect. 2, *ante*; “holder for value” defined by sect. 27 (2), (3), *ante*; and “holder in due course” defined by sect. 29, *ante*. As to “defects of title,” see sect. 29 (2), *ante*, and as to “payment in due course,” see

(*r*) *Holmes v. Durkee* (1883), 1 C. & E. 23.

(*s*) Cf. *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. at pp. 380—382; New York Negotiable Instruments Law, § 90.

(*t*) Cf. *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. at pp. 380—382; and see note to sect. 31 (3), *ante*.

(*u*) *Marston v. Allen* (1841), 8 M. & W. at p. 504, per Alderson, B., stating the principle.

sect. 59, *post*. It is to be noted that sect. 45 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), which provides for the re-vesting of stolen property in the true owner when the thief is convicted, does not apply to negotiable instruments. A defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title, and can give none. He is not the "holder" of the instrument (*x*).

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The power to negotiate a bill must be distinguished from the right to negotiate it. The right to negotiate is an incident of ownership; the power to negotiate is an incident of apparent ownership. Again, the right to sue must be distinguished from the right to recover, which depends on the further question whether the holder is a holder for value, and in some cases whether he is a holder for value without notice. The law as to the holder's rights of action and proof may perhaps be stated in the following rules:—

Rights of Action and Proof.

Rule 1. The holder of a bill is entitled to maintain an action thereon in his own name against all or any of the parties liable thereon (*y*), unless it is shown that he holds the bill adversely to the true owner (*z*).

Holder's right of action.

It is immaterial that the holder never had any interest in the bill (*a*), or that he has parted with his interest therein (*b*).

When the holder of a bill sues as agent for another person, or when he sues wholly or in part for the benefit of another person, any defence or set-off available against that person is available *pro tanto* against the holder (*c*).
Fox example:—

Suing as agent or trustee.

1. C., the holder of a bill, indorses it to D. for collec-

(*c*) But as to transfers abroad and the effect of forgery, see notes to sect. 72 (2), *post*, as to conflict of laws.

(*y*) See R. S. C. Ord. XVI. rule 5; and as to inferior Courts, 18 & 19 Vict. c. 67, s. 6.

(*z*) *Jones v. Broadhurst* (1850), 9 C. B. 173; *Agra Bank v. Leighton* (1866), L. R. 2 Ex. at pp. 63—65. See holder defined by sect. 2.

(*a*) *Law v. Parnell* (1859), 7 C. B. N. S. 282; 29 L. J. O. P. 17.

(*b*) *Williams v. James* (1850), 15 Q. B. 498; *Poirier v. Morris* (1853), 2 E. & B. 89; cf. *Megrath v. Gray* (1874), L. R. 9 C. P. 216.

(*c*) *Lee v. Zagury* (1817), 8 Taunt. 114; *Royce v. Barnes* (1846), 52 Massachus. 276; *Agra Bank v. Leighton* (1866), L. R. 2 Ex. 56; *Re Anglo-Greek Navigation Co.* (1869), L. R. 4 Ch. 174; *Pothier*, No. 41; cf. *Bechervaise v. Lewis* (1872), L. R. 7 C. P. 372.

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tion. D. can sue on it, but any defence available against C. is available against D. (*d*).

2. D. is the holder of a dishonoured bill for 100*l*. indorsed by C. C. pays D. 60*l*. D. sues the acceptor. As to 60*l*. D. sues as trustee for C., and only as to 40*l*. on his own account. As regards 60*l*. any set-off which the acceptor may have against C. is equally available against D. (*e*).

3. A. draws a bill on B., payable to his own order, for the price of goods supplied, which B. accepts. A. then indorses the bill to C. A. cannot sue B. for the price of the goods supplied while the bill is outstanding in the hands of C., and it is immaterial that he gets the bill back before the trial (*f*).

Where a person holds a bill as agent or trustee for another, he cannot use it as a set-off against a claim made against him individually (*g*).

Action on
bill payable
specially.

Rule 2. Subject to the rules as to transmission by act of law, when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons (*h*). For example:—

1. A bill is specially indorsed to the firm of “D. & Co.” An action on it must be brought in the name of the firm. The managing partner cannot sue on it in his own name.

2. A bill is specially indorsed to D., a partner in the firm of X. & Co., in payment of a debt due to the firm. An action on it must be brought in D.’s name, and not in the name of the firm (*i*).

In the case given in Example 1, the managing partner might indorse the bill in the firm’s name to himself or in blank, and then sue.

Action on
bill payable
to bearer.

Rule 3. Subject to Rule 1, when a bill is payable to

(*d*) *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained by *Currie v. Misa* (1875), L. R. 10 Ex. at p. 164, Ex. Ch.

(*e*) *Thornton v. Maynard* (1875), L. R. 10 C. P. 695.

(*f*) *Davis v. Reilly*, (1898) 1 Q. B. 1; followed *Re A Debtor*, (1908) 1 K. B. 344, 349, C. A.

(*g*) *London and Bombay Bank v. Narraway* (1872), L. R. 15 Eq. 93.

(*h*) *Attwood v. Rattenbury* (1822), 6 Moore, at p. 583; *Pease v. Hirst* (1829), 10 B. & C. 122.

(*i*) *Bawden v. Howell* (1841), 3 M. & Gr. 633.

bearer an action thereon may be brought in the name of any person who has either the actual or the constructive possession thereof; and constructive possession, jointly with others, is sufficient to entitle the possessor to sue alone. For example:—

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1. C., the holder of a bill, indorses it in blank to D. to collect it for him. Either C. or D. may sue the acceptor (*k*).

2. A bill accepted by B. is indorsed in blank by C. D., E. and F. bring an action on the bill against B. They can recover, although there is no evidence to show that they are partners, or what the nature of their joint interest is (*l*).

3. A bill is indorsed in blank to a firm. Any one of the partners may bring an action on it in his own name (*m*).

4. A bill indorsed in blank is handed to the manager of a company in payment of a debt due to the company. The manager may sue on it in his own name (*n*).

5. A bill indorsed in blank is given to D.'s solicitor, who commences an action on it against the acceptor in D.'s name. D. knows nothing of the matter, but after the action has proceeded some way he is told of it, and then gives his consent. D. can maintain the action (*o*).

6. D., the holder of a bill indorsed in blank, does not wish to sue on it in his own name. He accordingly asks E. to sue on it. E. consents. E. gets a copy of the bill, and it is agreed that he shall have the original when wanted. E. commences an action against the acceptor, and after action brought he gets the bill. E. cannot maintain this action, for at the time he began it he had neither the actual nor the constructive possession of the bill (*p*).

7. A note payable to bearer is handed to the solicitor

(*k*) *Clark v. Pigot* (1699), 12 Mod. 193; cf. *Stones v. Butt* (1834), 2 Cr. & M. 416.

(*l*) *Ord v. Portal* (1812), 3 Camp. 239; cf. *Rordasnz v. Leach* (1816), 1 Stark. 446; *Low v. Copestake* (1828), 3 C. & P. 300.

(*m*) *Lindley*, 3rd ed. p. 485; *Attwood v. Rattenbury* (1822), 6 Moore, 579; *Wood v. Connop* (1843), 5 Q. B. 292, as to joint holders; *Conover v. Earl* (1868), 26 Iowa R. 168, as to holders in common.

(*n*) *Law v. Parnell* (1859), 7 C. B. N. S. 282.

(*o*) *Ancona v. Marks* (1862), 31 L. J. Ex. 163.

(*p*) *Emmett v. Tottenham* (1853), 8 Exch. 884; cf. *Olcott v. Rathbone* (1830), 5 Wend. 490, New York.

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of a loan society in payment of a debt due to the society. D., a member of the society, instructs the solicitor to commence an action on it in his (D.'s) name against the maker. D. can maintain this action (*q*).

Holder's right
of proof.

Rule 4. When a party to a bill becomes bankrupt, the holder, who could have maintained an action against such party if he had remained solvent, can prove against his estate in bankruptcy (*r*).

Any defence, set-off, or counter-claim available in an action is available against a proof (*s*).

In one respect the right of proof is more extensive than the right of action. An action can only be brought to recover a debt which is due, but under Bankruptcy Act, 1914, § 30, a future or contingent debt may be proved; therefore, if the acceptor of a bill not yet due becomes bankrupt, the holder may prove, and so might the drawer or an indorser (*t*)—so, too, the holder of an accepted bill may prove if the drawer or an indorser becomes bankrupt (*u*). But as regards amount, the right to prove is narrower in some respects than the right to sue. The amount for which a holder can prove is limited by rules peculiar to bankruptcy, such as the rules relating to double proof (*x*) and creditors holding security (*y*). These it is beyond the scope of the present work to discuss in detail. See material provisions of the Bankruptcy Act, 1914, set out *post*, p. 411.

Transmission by Act of Law.

The Act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves

(*q*) *Jenkins v. Tongue* (1860), 29 L. J. Ex. 147.

(*r*) Cf. Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 59; cf. *Re Charles* (1873), L. R. 8 Ch. at p. 537. As to holder having a lien only, see notes to sect. 27 (3), *ante*.

(*s*) See, e.g., *Rohde v. Proctor* (1825), 4 B. & C. 517, want of notice of dishonour; *Ex parte Manners* (1811), 1 Rose, 68, want of a stamp; cf. *Jones v. Gordon* (1877), 2 App. Cas. 627, H. L.

(*t*) Cf. *Wood v. De Mattos* (1865), L. R. 1 Ex. 91, Ex. Ch.

(*u*) Cf. *Starey v. Barnes* (1806), 7 East, 435.

(*x*) See, e.g., *Re Douglas* (1872), L. R. 7 Ch. 490, foreign bankruptcy; approved *Banco De Portugal v. Waddell* (1880), 5 App. Cas. at p. 165; *Williams' Bankruptcy*, ed. 11, p. 142.

(*y*) See, e.g., *Re Howe* (1871), L. R. 6 Ch. 838, conditional acceptance. As to lumping bills for purposes of proof, see *Re Morris*, (1899) 1 Ch. 485, C. A. As to cross-accommodation acceptances, see *Williams' Bankruptcy*, ed. 11, pp. 156, 158, discussing the rule in *Ex p. Walker* (1798), 4 Ves. 373.

untouched the rules of general law which regulate the transmission of bills by act of law, and their transfer as choses in action or chattels according to the general law; see sect. 97 (2), *post*. The law on these points may, perhaps, be summed up in the following rules:—

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Rule 1. Since the Married Women's Property Act, Marriage. 1882 (45 & 46 Vict. c. 75), a bill payable to a woman, either before or after marriage, no longer vests in her husband.

Before that Act, except in the case of a bill forming part of the wife's separate estate (*z*), if a bill was held by an unmarried woman who subsequently married, or if a bill was made payable to a married woman, the title thereto vested in the husband, provided he reduced it into possession (*a*).

If the husband died without having reduced the bill into possession, the title thereto reverted to the wife if she was alive, and passed to her personal representatives if she died before her husband (*b*).

Rule 2. On the death of the holder of a bill the title thereto passes to his personal representatives (executors or administrators, as the case may be) (*c*). Thus:—

1. C., the holder of a bill payable to order, dies. His administrator can enforce payment of it or indorse it away, using his own name (*d*).

2. C., the holder of a bill payable to order, dies, having specifically bequeathed it to X. X. cannot sue on it or indorse it away, unless he first obtain the indorsement of C.'s executor (*e*).

An executor or administrator who indorses a bill may, in express terms, exclude personal liability: see sect 31 (5), *ante*; and as he is not the agent of the deceased he cannot by his delivery complete an indorsement written by the latter. He must indorse it *de novo*: see *ante*, p. 62. When there are two or more executors, the indorsement

(*z*) *Green v. Carlill* (1877), 4 Ch. D. 882.

(*a*) Cf. *Fleet v. Perrins* (1868), L. R. 3 Q. B. at p. 541; affirmed (1869), L. R. 4 Q. B. 500.

(*b*) *Hart v. Stephens* (1845), 6 Q. B. 937; *Williams on Executors*, 7th ed. pp. 848—852.

(*c*) *Williams on Executors*, 10th ed. pp. 606, 661.

(*d*) *Rawlinson v. Stone* (1746), 3 Wils. 1, Ex. Ch. He should specify the capacity in which he indorses to make the title clear.

(*e*) *Bishop v. Curtis* (1852), 21 L. J. Q. B. 391.

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of one is probably sufficient to transfer the property in the bill (*f*).

Execution.

Rule 3. A bill may be seized in execution by the sheriff under a writ of *fiery facias* (*g*).

Payment to the sheriff of a bill so seized is valid, and, if the judgment creditor give security, an action may be brought on the bill in the name of the sheriff (*h*).

The language of the Judgments Act, 1838, *post*, p. 386, is obscure and ungrammatical. Can the sheriff hand over to the creditor or sell a bill payable to bearer? (*i*). The Act gives him no power to indorse a bill payable to order. Further, he is responsible to the judgment debtor for any surplus over the amount of the debt and costs. It would seem, then, that he must keep all bills and endeavour to collect them himself. As to execution against bills and notes under the County Courts Act, 1888 (51 & 52 Vict. c. 43, §§ 147, 148), see *post*, p. 393.

Bankruptcy.

Rule 4. If the holder of a bill, who is the beneficial owner of it, become bankrupt, or if a bill be made payable to a bankrupt for his own account, the title thereto vests in his trustee in bankruptcy (*k*); but subject to the next rule (reputed ownership), if the holder of a bill is not the beneficial owner of it, the title thereto does not pass to his trustee in bankruptcy (*l*). Thus:—

1. C. indorses a bill to D., his agent, for some special purpose. D. becomes bankrupt. The title to the bill does not vest in D.'s trustee (*m*).

2. D., by fraud, induces C. to indorse a bill to him. D.

(*f*) *Williams on Executors*, 10th ed. p. 716. There is more doubt as to administrators, *ibid.* p. 720, n.

(*g*) 1 & 2 Vict. c. 110, s. 12. As to a cheque drawn by the Accountant-General of the Court of Chancery but not issued, cf. *Watts v. Jefferyes* (1851), 3 Mac. & G. 422; *Courtoy v. Vincent* (1852), 21 L. J. Ch. 291.

(*h*) 1 & 2 Vict. c. 110, s. 12, set out *post*, p. 386.

(*i*) Cf. *Mutton v. Young* (1847), 4 C. B. at p. 373.

(*k*) Cf. Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), § 38; cf. *Green v. Steer* (1841), 1 Q. B. 707.

(*l*) Bankruptcy Act, 1914, § 38; *Harrison v. Walker* (1792). Peake, 111.

(*m*) *Ex parte Armitstead* (1828), 2 G. & J. 371; cf. *Belcher v. Campbell* (1845), 8 Q. B. at p. 11. See, e.g., *Thompson v. Giles* (1824), 2 B. & C. 422, bill entered "short" by banker; *Ex parte Plitt. Re Brown* (1889), 6 Morrell, 81, cheque specially intrusted for collection.

becomes bankrupt. The title to the bill does not pass to D.'s trustee (*n*).

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The title of the trustee relates back to the commencement of the bankruptcy. It is sometimes a difficult question to determine the exact time when a bankruptcy commences, but this is a question beyond the scope of a treatise on bills. When the holder has merely a lien on a bill his trustee stands exactly in his shoes, having the same rights and duties in regard to it (*o*). Where a bill is indorsed to an undischarged bankrupt, it seems he may sue on it in his own name, unless his trustee interferes and objects (*p*).

Exception 1.—The bankrupt holder of a bill who negotiates it before the date of the receiving order can give a good title to a person who takes it in good faith for value, and without notice that such holder has committed an available act of bankruptcy (*q*).

Exception 2.—Payment of a bill to a bankrupt holder is valid if made before the date of the receiving order in good faith, and without notice that he has committed an available act of bankruptcy (*r*).

Exception 3.—An accommodation bill given for the accommodation of the bankrupt (probably) does not pass to the trustee in bankruptcy. Thus:—

A. draws a bill on B. payable to his own order. B. accepts it to accommodate A. A. is adjudicated bankrupt. He subsequently indorses the bill to C., who gives value. The indorsement is valid. C. can sue B. (*s*).

The terms of the Bankruptcy Act, 1914, are very wide, see § 38; but the cases quoted probably still hold good.

Rule 5. If the holder of a bill, who is not the beneficial owner of it, become bankrupt, the title thereto may pass to his trustee in bankruptcy, as being in his reputed ownership, provided—(a) that the bill constitutes “a

Reputed
ownership.

(*n*) *Harrison v. Walker* (1792), Peake, 111.

(*o*) Cf. *Ex parte Buchanan* (1812), 1 Rose, 280.

(*p*) *Herbert v. Sayer* (1844), 5 Q. B. 965; approved, *Jameson v. Brick and Stone Co.* (1878), 4 Q. B. D. 208, C. A.; cf. *Cohen v. Mitchell* (1890), 25 Q. B. D. 262, at p. 269.

(*q*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45. As to what constitutes such notice, see *Ex parte Gilbey* (1878), 8 Ch. D. 248, C. A.

(*r*) Bankruptcy Act, 1914, s. 45.

(*s*) *Wallace v. Hardacre* (1807), 1 Camp. 45; *Willis v. Freeman* (1810), 12 East, 656.

§ 38. debt due or growing due to him in the course of his trade or business; " (b) that he held it at the commencement of the bankruptcy with the consent and permission of the true owner (t). It seems clear that a current bill would constitute a "debt growing due" within the meaning of the Act (u).

Transfer by Assignment.

Assignment
or sale.

Rule 6. A bill may be transferred by assignment or sale, subject to the same conditions that would be requisite in the case of an ordinary chose in action. Thus:—

C. is the holder of a note payable to his order. He may transfer his title to D. by a separate writing assigning the note to D. (x); or by a voluntary deed constituting a declaration of trust in favour of D. (y), or by a written contract of sale (z).

A bill is a chattel: therefore it may be transferred as a chattel (a). A bill is a chose in action; therefore it may be assigned as a chose in action (b). It is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment according to the general law, *e.g.*, C., the holder of a bill payable to bearer, assigns by deed certain property, including the bill, to D. C. no longer has any property in the bill, but he holds it, and if he transfers it by delivery to E., who takes it for

(t) Bankruptcy Act, 1914, s. 38 (2) (c); cf. *Ex parte Kemp* (1874), L. R. 9 Ch. App. at p. 389; *Williams' Bankruptcy*, ed. 11, pp. 257, 272.

(u) *Ex parte Kemp* (1874), L. R. 9 Ch. at p. 388, Mellish, L.J. As to the previous law, cf. *Hornblower v. Proud* (1819), 2 B. & Ald. 327; *Thompson v. Giles* (1824), 2 B. & C. 422. As to the effect on a debt of a bill drawn by a bankrupt, see *Re Goetz*, (1898) 1 Q. B. 787, C. A.

(x) *Re Barrington* (1804), 2 Scho. & Lef. 112; cf. *Lee v. Magrath* (1882), 10 Ir. L. R. 45, 313.

(y) *Richardson v. Richardson* (1867), L. R. 3 Eq. 686, as explained in *Warriner v. Rogers* (1873), L. R. 16 Eq. 340; cf. *Ex parte Whitaker* (1889), 42 Ch. D. 119, C. A., distinguishing a voluntary note from a voluntary bond.

(z) *Sheldon v. Parker* (1874), 3 Hun. New York R. 498.

(a) *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677, C. A. The validity of the transfer depends on the law of the country where the bill is transferred.

(b) It may constitute a "book debt": *Dawson v. Isle*, (1906) 1 Ch. 633.

value and without notice, E.'s title overrides D.'s (c). *Quære*, if a non-negotiable note can be assigned, there being an intention manifest on the instrument that it shall not be transferable (d). Notice to a debtor who has given a cheque or other negotiable instrument for his debt that the debt has been assigned by the creditor can be disregarded by the debtor, even if the creditor who has assigned the debt is the holder of the instrument (e).

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Rule 7. If the holder of a bill make delivery of it by way of gift in contemplation of death and die, this is a valid *donatio mortis causâ* (f). Thus:—

1. C., the holder of a note payable to bearer, hands it to D. in contemplation of death. C. dies. The property in the note passes to D. (g).

2. C., the holder of a bill payable to his order, gives it to D. in contemplation of death, and dies. The title to the bill passes to D. (h).

3. B. makes a note payable to C., and hands it to him as a gift in contemplation of death. B. dies. C. (perhaps) is not entitled to receive the amount out of B.'s estate (i).

4. C., the holder of a banker's deposit note, with a form of cheque on the back, gives it to D. in contemplation of death, and dies. D. is entitled to the money (k).

It is clear that the gift of a bill or note does not create a debt against the donor; but is this the principle of a *donatio mortis causâ*? The law as to the gift of bills and notes made by the donor requires reconsideration (l). Most of the recent cases have arisen on cheques where the peculiar relations of banker and customer complicate the matter: see *post*, p. 289. *Quære*, in Illustration 2, must D. sue on the bill in the name of C.'s executor, or can he compel C.'s executor to indorse the bill to him as he could if he had given value?

(c) Cf. *Sheldon v. Parker* (1874), 3 Hun. R. 498; *Aulton v. Atkins* (1856), 18 C. B. 249; and sect. 31 (4), *ante*.

(d) Cf. *Brice v. Bannister* (1878), 3 Q. B. D. at pp. 580, 581, per Brett, L.J.

(e) *Bence v. Shearman*, (1898) 2 Ch. 582, C. A.

(f) *Williams on Executors*, 10th ed. pp. 591—600.

(g) *Miller v. Miller* (1735), 3 P. Wms. 356.

(h) *Veal v. Veal* (1859), 27 Beav. 303; *Austin v. Mead* (1880), 15 Ch. D. 651; *Clement v. Cheeseman* (1884), 27 Ch. D. 631.

(i) *Tate v. Hilbert* (1793), 4 Bro. C. C. 286; *Holliday v. Atkinson* (1826), 5 B. & C. at p. 503; cf. *Re Whitaker* (1889), 42 Ch. D. 119, at p. 124.

(k) *Re Dillon* (1890), 44 Ch. D. 76, C. A.; *Re Wasserberg*, (1915) 1 Ch. 195 (bearer bonds in box at bank, delivery of key to wife).

(l) Cf. *Williams on Executors*, 10th ed. 598—600.

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General Duties of the Holder.

[When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest, or notice of dishonour, such party, it seems, is also discharged from liability on the debt or other consideration for which the bill was given (*m*). The holder's omission, without lawful excuse, to perform his duties with reference to a bill, is commonly called "laches" (*n*). As the Crown can do no wrong, so also it cannot be guilty of laches. The duties in question are not absolute duties; but, throughout the Act, the holder is required to use reasonable diligence in order to fulfil them.]

When presentment for acceptance is necessary.

39. (1) Where a bill is payable after sight (*o*), presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill (*p*).

Sub-sect. (2) settled a doubtful point. Sub-sect. (3) is declaratory (*q*).

(*m*) See, e.g., *Soward v. Palmer* (1818), 8 Taunt. 277; *Peacock v. Purssell* (1863), 32 L. J. C. P. 266, presentment for payment; *Bridges v. Berry* (1810), 3 Taunt. 130, and *Peacock v. Purssell*, *supra*, as to notice of dishonour; cf. also, *Crowe v. Clay* (1854), 9 Exch. 604, Ex. Ch. (lost bill); *Daniel*, ed. 4, § 1276; *Chitty*, ed. 11, p. 313; *Story*, § 109. But see note, *post*, pp. 357, 358. Must the party discharged be prejudiced by the omission?

(*n*) Cf. *Turner v. Haydon* (1825), 4 B. & C. at p. 2, per Abbott, C.J.

(*o*) See sect. 40, as to bills payable after sight.

(*p*) New York Negotiable Instruments Law, § 240, overriding, it seems, *Walker v. Stetson* (1869), 2 Amer. R. 405. French law appears to coincide with the English Act, see *Nouguier*, § 1008.

(*q*) Cf. *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. at pp. 65, 66; German Exchange Law, Arts. 19 and 24.

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Where presentment is optional, the object of presenting is (1), to obtain the acceptance of the drawee, and thereby secure his liability as a party to the bill; (2), to obtain an immediate right of recourse against antecedent parties in case the bill is dishonoured by non-acceptance. An agent is bound to use due diligence in presenting for acceptance, even when presentment is optional for the purposes of the Act, and he is liable to his principal for damage resulting from his negligence (*r*). A bill in the form "Pay without acceptance" is valid (*s*). Bills in this form are said to be common in the French wine trade.

Subject to sect. 40 (2) the question of due presentment is only material when acceptance cannot be obtained. If acceptance is obtained the informality of the presentment is immaterial. There is very little English authority on the subject, and it is to be noted that rules as to presentment for payment necessarily differ in some respects from rules as to presentment for acceptance, see *post*, p. 158.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (*t*).

Domiciled
bill coming
forward late.

This sub-section, which is rendered necessary by sub-section (2), was added in committee. It settles a moot point, and perhaps alters the law. Suppose a bill, payable one month after date, is drawn in New York on a Liverpool firm, but payable at a London Bank. It only reaches

(*r*) *Pothier*, No. 128; *Nouguier*, § 462; *Allen v. Suydam* (1828), 20 Wend. 321, New York, as to date bills; see *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. at p. 542, after sight bill.

(*s*) *R. v. Kinneir* (1838), 2 M. & R. 117; *Miller v. Thomson* (1841), 3 M. & Gr. 576; *Nouguier*, § 470.

(*t*) New York Negotiable Instruments Law, § 244.

§ 39. the English holder, or his agent, on the day that it matures. He must, nevertheless, present it for acceptance to the drawees in Liverpool. The Act provides that he shall not be prejudiced by so doing. Before the Act the usual practice was to protest the bill in London without any presentment to the drawees—an obviously inconvenient mode of proceeding, for the holder's object is to get the bill paid, and not to run up expenses against the drawer and indorsers.

Time for
presenting
bill payable
after sight.

40. (1) Subject to the provisions of this Act (*u*), when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged (*x*).

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

ILLUSTRATIONS.

1. A. in Windsor draws a bill on B. in London, payable one month after sight. The holder keeps it for four days before presenting it for acceptance. It is then dishonoured. This may not be an unreasonable delay (*y*).

2. A. in London draws a bill on B. in Rio, payable sixty days after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay (*z*).

3. A. in Newfoundland draws a bill (*in a set*) on B. in London, payable ninety days after sight. The payee holds it back for two months, and then forwards it for presentment. No reason for holding back is shown. This may be an unreasonable delay (*a*).

(*u*) For the provisions referred to, see sect. 41 (2), *post*, which deal with the excuses for non-presentment.

(*x*) New York Negotiable Instruments Law, § 241.

(*y*) *Fry v. Hill* (1817), 7 Taunt. 397; cf. *Shute v. Robins* (1828), 2 C. & P. 80.

(*z*) *Mellish v. Rawdon* (1832), 9 Bing. 416.

(*a*) *Straker v. Graham* (1839), 4 M. & W. 721.

4. A. in Calcutta draws a bill on B. in Hong Kong, payable sixty days after sight. The holder retains it for five months, during which time China bills are at a discount. He then negotiates it. This may be an unreasonable delay (*b*).

5. A. draws a bill on B., payable to C. three months after sight. C. holds it back for an unreasonable time. He then presents it, and it is accepted. Before it is due the acceptor fails. A. is (probably) discharged (*c*).

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Reasonable time is a mixed question of law and fact, and in determining it regard must be had to the interests of the holder as well as to the interests of the drawers and indorsers (*d*). *Qu.*, what, if any, is the liability of a person who retains a bill an unreasonable time and then negotiates it without indorsement? Again, does not negotiation within a reasonable time, *loties quoties*, excuse presentment, or is there any limit? Under the continental codes fixed limits of time for presentment are laid down. The effect of this conflict of laws has not been considered.

41. (1) A bill is duly presented for acceptance which is presented in accordance with the following rules (*e*):

Rules as to presentment for acceptance, and excuses for non-presentment.

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

See "holder" defined by sect. 2, *ante*. He is not necessarily the lawful holder (*f*). In an unreported case, in December, 1876, the Court of Appeal dissolved an injunction restraining the drawee from accepting a bill where the holder was alleged to have obtained it by

By whom.

(*b*) *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. 46; cf. *Godfray v. Coulman* (1859), 13 Moore, P. C. 11.

(*c*) *Straker v. Graham* (1839), 4 M. & W. 721 (action for freight for which bill had been given).

(*d*) *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. 46; *Wallace v. Agry* (1827), 4 Mason, 336, Sup. Ct. U. S., per Story, J.

(*e*) Cf. New York Negotiable Instruments Law, §§ 242, 243.

(*f*) Cf. *Morrison v. Buchanan* (1833), 6 C. & P. 18.

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fraud (*g*). The holder need not present personally. Bills are constantly forwarded, unindorsed, to an agent for him to procure acceptance. The agent is bound to exercise due diligence in presenting (*h*). “Ce n’est pas uniquement le porteur qui a qualité pour requérir l’acceptation: cette faculté appartient encore à celui qui en est seulement détenteur”: *Nouguier*, § 462. Presentment for acceptance does not imply any warranty that the bill, and documents, if any, attached thereto are genuine (*hh*).

To whom.

The presentment, if not made to the drawee, must be made to some one authorized to receive bills for acceptance (*i*). Thus, presentment to a servant who opened the door would not be sufficient; and if a bill is domiciled for payment at a bank, presentment at the bank would not suffice (*k*). Putting a bill in the bill box, or giving a bill to a clerk in the office in the usual way, is, of course, a presentment to the drawee. As to post office, see clause (*e*). Reasonable diligence must be used to find the drawee or some person authorized to act for him. When the drawee is a trader it is clear that presentment should be made to him at his place of business if possible.

Day and hour.

As to non-business day, see sect. 92, *post*. The Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), s. 2, provides that when the day on which a bill should be presented for acceptance is a bank holiday, it is to be presented on the next business day.

“Reasonable hour,” in the case of a trader, means business hours, and in the case of a banker banking hours (*l*).

Before maturity.

A bill should clearly be presented for acceptance before maturity (*m*). It may be accepted when overdue, see sect. 18; but except in the case provided for by sect. 39 (4), *i.e.*, domiciled bill arriving late, such acceptance does not preserve or revive the liability of the drawer and indorsers.

(*g*) But an injunction will issue to prevent a bank from accepting a bill payable on demand in violation of the statutory privileges of the Bank of England, *Bank of England v. Anderson* (1836), 2 Keen, 328.

(*h*) *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. at p. 452; *Nouguier*, § 462.

(*hh*) *Guarantee Trust Co. of New York v. Hannay*, (1918) 2 K. B. 623, C. A.

(*i*) *Cheek v. Roper* (1804), 5 Esp. 175.

(*k*) *Chitty on Bills*, 11th ed. p. 196; Netherlands Code, Art. 176.

(*l*) Cf. *Parker v. Gordon* (1806), 7 East, 385; *Elford v. Teed* (1813), 1 M. & S. 28, and note to sect. 45 (3), *post*, p. 165.

(*m*) *O'Keefe v. Dunn* (1815), 6 Taunt. at p. 307; *Nouguier*, § 456.

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In the case of a bill which is due or payable on demand, presentment for acceptance is merged in presentment for payment. When a bill is presented for payment, the drawee, instead of paying it, often accepts it payable at his bankers. This is, in effect, a kind of payment by cheque (*n*), which the holder perhaps might refuse to take. Suppose a bill drawn on Edinburgh is accepted payable in London. This is a general acceptance, but it involves presentment in London in order to charge the drawer and indorsers. In New York it has been held that if a bill payable after date be presented on the day it is due and dishonoured, it is immaterial whether it is treated as dishonoured by non-acceptance or non-payment (*o*). Considering the difference in the rules which govern the two kinds of presentment, this might have important consequences.

- (b) Where a bill is addressed to two or more drawers, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only: Two or more drawers.

This sub-section may give rise to a difficulty if one of the drawees refuses to accept, for by sect. 19 (2) (*e*) an acceptance which is not the acceptance of all the drawees is a qualified acceptance. As to the consequences of a qualified acceptance, see sect. 44, *post*.

- (c) Where the drawee is dead presentment may be made to his personal representative (*p*): Drawee dead.
 (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee (*q*): Drawee bankrupt.
 (e) Where authorized by agreement or usage, Post office.

(*n*) Cf. *Bishop v. Chitty* (1742), 2 Stra. 1195.

(*o*) *Plato v. Reynolds* (1863), 27 New York R. 586.

(*p*) Before this enactment the law on this point was very doubtful. *Smith v. New South Wales Bank* (1872), 8 Moore, P. C. N. S. at pp. 461, 462. Now the holder has an option: see sub-sect. (2) (*a*), *post*.

(*q*) See "bankrupt" defined by sect. 2, *ante*, p. 4. Sub-sect. (2) (*a*) makes the holder's option clear.

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a presentment through the post office is sufficient (*r*).

Excuses for
non-present-
ment for
acceptance.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill (*s*):

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected (*t*):

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground (*u*).

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Sub-sect. (3) is declaratory (*x*). It, of course, only applies to cases where presentment is obligatory.

Acceptance
and payment
compared.

Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill

(*r*) This enactment gives effect to the recognised practice among English merchants. The practice is not recognised by the continental codes.

(*s*) See "bankrupt" defined by sect. 2, *ante*, p. 4; and as to persons not having capacity to contract by bill, see sect. 22, *ante*.

(*t*) This is probably declaratory. Cf. *Smith v. New South Wales Bank* (1872), 8 Moore, P. C. N. S. at pp. 461—463; also sect. 46 (2) and sect. 50 (2).

(*u*) This is, perhaps, new law, and is important, having regard to the next sub-section. Cf. New York Negotiable Instruments Law, § 245.

(*x*) *Ex parte Tondeur* (1867), L. R. 5 Eq. at p. 165; *Robinson v. Ames* (1822), 20 John. at p. 149, New York; cf. sect. 46 (2), and sect. 50 (2).

should be presented for payment where the money is. Any one can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment. § 41.

42. When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Non-acceptance after customary time for consideration.

This section was much discussed in committee, and was eventually reduced to its present vague form, as the bankers and merchants took different views as to the exact rights of the parties. The probable effect of it as regards trade bills, is this: If a bill, left for acceptance within business hours one day, is not accepted before the close of business hours on the next day, it must be noted for non-acceptance, or otherwise treated as dishonoured. As to protest for non-delivery, see sect. 51 (8), *post*.

The practice is usually stated as follows:—The person who presents a bill of exchange for acceptance must deliver it up to the drawee if required so to do. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must re-deliver it accepted or unaccepted (*y*). In reckoning the twenty-four hours non-

(*y*) *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. at pp. 542, 543; *Story*, § 237; French Code, 125; *Nouguier*, § 537. But see *Brooks' Notary*, 6th ed. p. 78, as to alleged practice when it is thought unsafe to leave the bill with the drawee. The holder, after exhibiting the bill to him, leaves a formal notice that the bill lies for acceptance at a specified address. The Act leaves this point open, as also does the New York Law.

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business days must be excluded (*z*). The New York Negotiable Instruments Law, § 224, provides that "the drawee is allowed 24 hours after presentment in which to decide whether or not he will accept the bill, but the acceptance if given dates as of the day of presentation."

In a case in 1818, Bayley, J., says, "When a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not the duty of the other person to send it to him, unless there is a usual course of dealing between the individuals concerned so to do." He then proceeds to decide what the Act now makes clear, viz., that the destruction of the bill by the drawee does not amount to an acceptance (*a*). The holder's remedy is an action for damages.

Dishonour by
non-accept-
ance and its
consequences.

43. (1) A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act (*b*), when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (*c*).

As to the presentment for acceptance, see sect. 41; as to the requisites of a valid acceptance, see sects. 17 and

(*z*) *Bank of Van Diemen's Land v. Victoria Bank* (1871), L. R. 3 P. C. at pp. 546, 547, as to the effect of a short day—*e.g.*, Saturday; and see sect. 92.

(*a*) *Jeune v. Ward* (1818), 1 B. & Ald. 653, at p. 659. Under § 225 of the New York Negotiable Instruments Law, if the drawee wrongly retains or destroys the bill he is deemed to have accepted it.

(*b*) See sect. 65, *post*, acceptance for honour.

(*c*) Cf. New York Negotiable Instruments Law, §§ 246—248.

19. By sect. 44 (1), the holder has an option to take or refuse a qualified acceptance (*d*). See also last section. As to excuses for not presenting for acceptance, see sect. 41 (2).

§ 43.

According to English law the holder is under no obligation to resort to the case of need, if such there be; but if he does so, and obtains an acceptance for honour, his right of recourse against the drawer and indorsers is suspended. The effect of this suspension on the Statute of Limitations has not been considered.

The immediate right of recourse arising on non-acceptance is an exceptional right (*e*), and until quite recently was peculiar to the English and American law (*f*). Under most of the continental codes the holder can only protest the bill for non-acceptance, and demand security from the drawer and indorsers (*g*). The effect of this conflict of laws does not appear to have been judicially considered.

A bill which has been dishonoured by non-acceptance may subsequently be accepted (see sect. 18 (2), (3), *ante*), but it seems clear that in such case it is in the holder's option to allow the bill to be accepted or not.

On non-acceptance the holder has an immediate "right of recourse," that is, "resort," to the drawer and indorsers; but no right of "action" arises until he has performed the conditions precedent by giving notice of dishonour, and protesting, when necessary. As a general rule, the holder's cause of *action* is not complete until notice of dishonour has been received by the party sought to be charged (*h*).

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

Duties as to qualified acceptances.

(*d*) It has been held in the United States that an agent for collection has *prima facie* no authority to take a qualified acceptance: *Walker v. New York State Bank*, 9 N. Y. Rep. 582.

(*e*) Cf. *Dunn v. O'Keeffe* (1816), 5 M. & S. at p. 289.

(*f*) *Whitehead v. Walker* (1842), 9 M. & W. at p. 516; *Watson v. Tarpley* (1855), 20 How. at p. 519, Sup. Ct. U. S.

(*g*) French Code, Arts. 119, 120.

(*h*) *Castrique v. Bernabo* (1844), 6 Q. B. 498.

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(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice(*i*) has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto (*k*).

As to what acceptances are qualified, see sect. 19, *ante*. According to the continental codes, it seems that the holder cannot refuse a partial acceptance (*l*). He can only protest as to the balance.

In some trades, such as the East Indian, the practice of accepting against delivery of bills of lading is so common, that an authority to take such an acceptance might, perhaps, be implied (*ll*). Sometimes, too, the terms of a documentary bill or credit might be such as impliedly to authorize it.

Where the holder elects to take a qualified acceptance he should give notice of the qualification to prior parties, not notice of dishonour (*m*).

Sub-sect. (3) settles a doubtful point in favour of the holder (*n*).

(*i*) Cf. *Sebag v. Abitbol* (1816), 4 M. & S. at p. 466.

(*k*) Cf. New York Negotiable Instruments Law, § 230, which, however, omits the second paragraph of sub-sect. (2).

(*l*) French Code, Art. 124; German Exchange Law, Art. 22.

(*ll*) See the form of acceptance in *Ex p. Brett* (1871), L. R. 6 Ch. App. 838.

(*m*) Cf. *Bentinck v. Dorrien* (1805), 6 East, 199.

(*n*) See subject discussed in *Rowe v. Young* (1820), 2 Bligh, 391, H. L.

45. Subject to the provisions of this Act(*o*) a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged. **§ 45.**
Presentment
for payment.

A drawer or indorser who is discharged from his liability on the bill, it seems, is also discharged from his liability on the consideration therefor (*p*).

The rules applicable to the drawer or indorser of a bill apply equally to the indorser of a note (*q*) or cheque, but they do not apply to the maker of a note, who is sometimes called the drawer: and they are modified as to time as regards the drawer of a cheque (sect. 74). According to French Code, Art. 161, a bill must be presented for payment on the day it falls due, but it seems no penalty follows the omission to present, provided the bill be duly protested on the following day: *Nouguier*, § 1076. Practically, then, protest is substituted for presentment for payment. Again, a distinction is drawn between the drawer and the indorsers. Omission duly to protest discharges the indorsers, but the drawer is not discharged, unless he shows affirmatively that the drawee or acceptor had funds to meet the bill (*r*).

A bill is duly presented for payment which is presented in accordance with the following rules:— Rules.

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due(*s*). At what time.

(*o*) See sect. 46, which deals with excuses for non-presentment and delay, and sect. 39 (4), *ante*, which deals with the special case of an unaccepted domiciled bill coming forward late.

(*p*) *Peacock v. Purssell* (1863), 32 L. J. C. P. 266. But see *post*, p. 358.

(*q*) Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at pp. 262, 263, Ex. Ch.

(*r*) French Code, Arts. 117 and 170; *Nouguier*, §§ 1147—1165.

(*s*) As to calculating the due date, see sect. 14, *ante*. The provision is declaratory: *Philpot v. Biant* (1828), 4 Bing. at p. 720; New York Negotiable Instruments Law, § 131; French Code, Art. 161; see, e.g., *Wiffen v. Roberts* (1795), 1 Esp. 262, second day of grace; *Prideaux v. Collier* (1817), 2 Stark. 58, day after maturity.

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(2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable(*t*).

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

As to when a bill is in legal effect payable on demand, see sect. 10, *ante*. This provision is modified by sect. 74, *post*, as regards the drawer of a cheque. Compare sect. 40, as to presentment for acceptance of bill payable after sight. Under the continental codes bills payable at sight must be presented for payment within the like fixed limits of time that bills payable after sight must be presented for acceptance(*u*). As to notes see sect. 86, *post*.

Presentment
for payment.

(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as herein-after defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found(*x*).

(*t*) Cf. *Moule v. Brown* (1838), 4 Bing. N. C. 266, as to a cheque cashed for the bearer; and cf. New York Negotiable Instruments Law, § 131, and notes in *Crawford's* edition. The second clause of the subsection is confined to bills of exchange.

(*u*) French Code, Art. 160; German Exchange Law, Art. 31.

(*x*) Cf. New York Negotiable Instruments Law, § 132.

The acceptor's obligation is to pay the holder, that is, the person who can give a good discharge for the bill (*y*). As to presentment through the post-office, see subsect. (8). The person who presents a bill for payment must exhibit the bill and be ready and willing to deliver it up on receiving payment (*z*). He does not guarantee its authenticity (*a*).

If the bill be lost a copy should be presented and an indemnity tendered; but *qu.* as to the sufficiency of this? A protest, it seems, can be made on a copy: sect. 51 (8), *post*. The provision that the loss of a bill shall not be set up in an action if an indemnity be given hardly seems to meet the present case. As to the parts of a set, see sect. 71, *post*. As to non-business days, see sect. 92, *post*. The reasonableness of the hour must depend on whether the bill is payable at a place of business or at a private house. The payor is not bound to stay at his place of business after a reasonable hour. If a bill be payable at a bank it must be presented within banking hours (*b*); if at a trader's place of business, then within ordinary business hours (*c*); if at a private house, probably a presentment up to bed-time would be sufficient (*d*).

In America presentments at 8 a.m. and 11 p.m. have been held unreasonable: *Daniel*, § 348. Before the Act, it was held that if a bill was presented at an unreasonable hour, but payment was refused on some other ground, the presentment was good (*e*). Possibly the same rule might still be applied: see note, *post*, p. 169.

Speaking generally, it is the duty of the payor to have the money ready on the appointed day at the appointed

§ 45.

By whom.

Day and hour.

To whom.

(*y*) See sect. 59, and cf. *Walker v. Macdonald* (1848), 2 Exch. at p. 532; *Cole v. Jessop* (1854), 10 New York R. at p. 100.

(*z*) Sect. 52 (4); cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at pp. 760, 761.

(*a*) *Guarantee Trust Co. of New York v. Harnay* (1918), 23 Com. Cas. at p. 402, C. A.; (1918) 2 K. B. 623, 632, C. A.

(*b*) *Elford v. Teed* (1813), 1 M. & S. 28; *Parker v. Gordon* (1806), 7 East, 385; cf. *Whitaker v. Bank of England* (1835), 1 C. M. & R. 750.

(*c*) Cf. *Allen v. Edmundson* (1848), 2 Exch. at p. 723; *Morgan v. Davison* (1815), 1 Stark. 114, time 6.30 p.m.; *Barclay v. Bailey* (1810), 2 Camp. 527, time 8 p.m. Have not business hours changed since then?

(*d*) *Triggs v. Newnham* (1825), 10 Moore, 249, time 8 p.m.; *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

(*e*) *Henry v. Lee* (1820), 2 Chitty, 124; *Garnett v. Woodcock* (1817), 6 M. & S. 44.

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place, and if the holder after the exercise of reasonable diligence cannot find any such person there, he has done all that is required of him (*f*): see sub-sect. (5), *post*.

Duties of Agent.—A collecting agent is, of course, liable to his principal if he does not use due diligence in presenting a bill for payment and take the proper proceedings on dishonour (*g*). The same rule applies to a pledgee or person holding a bill as collateral security (*h*). An agent is, as a rule, responsible for the default of a sub-agent whom he employs; but in some of the American States an exception is admitted when the sub-agent is a notary, on the ground that he is a public officer (*i*).

At what
place.

(4) A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented.

The place of payment may be specified either by the drawer (*k*), or by the acceptor (*l*). If alternative places of payment are specified, presentment at either of such places is sufficient (*m*).

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented (*n*).

(c) Where no place of payment is specified,

(*f*) *De Bergareche v. Pillin* (1826), 3 Bing. 476; *Wilmot v. Williams* (1844), 7 M. & Gr. 1017; cf. *Butterworth v. Le Despencer* (1814), 3 M. & S. 150; *Startup v. Macdonald* (1843), 6 M. & Gr. at p. 624.

(*g*) Cf. *Lubbock v. Tribe* (1838), 3 M. & W. at p. 621; *Lysaght v. Bryant* (1850), 19 L. J. C. P. at p. 160, Maule, J.; and see *Derrell v. Burnell* (1873), 11 R. 8 C. P. 475, measure of damage; *Paget* on Banking, ed. 2, p. 287.

(*h*) *Peacock v. Purcell* (1863), 32 L. J. C. P. 266.

(*i*) *Daniel*, § 343; *Parsons*, p. 480; cf. *Paget*, p. 288.

(*k*) *Gibb v. Mather* (1832), 2 Cr. & J. 254; *Walker v. Stetson* (1869), 2 Amer. R. 405; German Exchange Law, Art. 42.

(*l*) *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

(*m*) *Beeching v. Gower* (1816), Holt N. P. C. 313; cf. *Pollard v. Herries* (1803), 3 B. & P. 335.

(*n*) See *Hine v. Allely* (1833), 1 N. & M. 433; *Buxton v. Jones* (1840), 1 M. & Gr. 83.

and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence if known (*o*).

(d) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence (*p*).

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

ILLUSTRATIONS.

1. A bill is accepted "Payable at 1, Duke Street, London." The acceptor dies. Presentment at 1, Duke Street, is sufficient, without making search for the acceptor's executor (*q*).

2. The acceptor of a bill accepts it payable at his banker's. The bill must be presented at the bank. A presentment to the acceptor personally is insufficient (*r*).

3. A bill is addressed to "Mr. B., 1, Duke Street, London." B. accepts it generally. The bill is presented at 1, Duke Street, and the house is found shut up. This is sufficient (*s*).

4. A bill is addressed to "Mr. B., 1, Duke Street, London." B. accepts it generally. The holder takes the bill to 1, Duke Street, and inquires for B. A woman living in the house informs him that B. has left. This is sufficient (*t*).

5. A bill is accepted payable at a bank. When the bill matures the bank is the holder of the bill, but the acceptor has no assets

(*o*) See *Sheil v. Britt* (1823), 18 Mass. 412; *Meyer v. Hibsher* (1872), 47 New York R. at p. 270; *Crosse v. Smith* (1813), 1 M. & S. at p. 554.

(*p*) See *King v. Crowell* (1873), 14 Amer. R. 560; New York Negotiable Instruments Law, § 133.

(*q*) *Philpot v. Briant* (1827), 3 C. & P. 244; cf. *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

(*r*) *Gibb v. Mather* (1832), 2 Cr. & J. 254, Ex. Ch.; *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

(*s*) *Hine v. Allely* (1833), 4 B. & Ad. 624; cf. *Crosse v. Smith* (1813), 1 M. & S. at p. 554.

(*t*) *Buxton v. Jones* (1840), 1 M. & Gr. 83.

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there. This is sufficient. No personal demand on the acceptor is necessary (*u*).

6. A bill is accepted payable at a bank. If the bill is presented to a clerk or agent of the bank at the *Clearing House*, that is a presentment to the bank and sufficient (*x*).

Two or more
drawees.

(6) Where a bill is drawn upon or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

This is probably declaratory (*y*), but the point was not clear. Of course, if one pays, or in refusing payment, acts as the agent of the others, that is enough.

Drawee or
acceptor dead.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

This is declaratory (*z*). Compare sect. 41 (2) (a), as to presentment for acceptance, where different considerations apply, and a different rule is accordingly laid down.

(*u*) *Bailey v. Porter* (1845), 14 M. & W. 44.

(*x*) *Reynolds v. Chettle* (1811), 2 Camp. 595; *Harris v. Parker* (1833), 6 Tyr. 370. As to the practice of the Clearing House and the distinction between London and country cheques, see *Boddington v. Schlencher* (1833), 4 B. & Ad. 752; London Clearing House Rules and Regulations, 1910; and *Hart's Law of Banking*, pp. 312—319, citing *Parr's Bank v. Ashby* (1898), 14 T. L. R. 563; *Paget on Banking*, ed. 3, pp. 355—358. The average amount of bills and cheques dealt with by the London Clearing House exceeds forty millions a day.

(*y*) *Union Bank v. Willis* (1844), 49 Massachus. R. 504; see *Gates v. Beecher* (1875), 60 New York R. 518, as to ex-partners; *Britt v. Lawson* (1878), 22 Hun. R. 123, New York, as to joint and several note; New York Negotiable Instruments Law, § 138; cf. a special provision as to partners and ex-partners in § 137.

(*z*) *Williams on Executors*, 10th ed. p. 1607; cf. *Caunt v. Thompson* (1849), 7 C. B. 400; French Code, Art. 163; New York Negotiable Instruments Law, § 136.

- (8) Where authorized by agreement or usage § 45.
 a presentment through the post office is Post office.
 sufficient.

This gives effect to a recognised practice in England and the United States (*a*).

The sufficiency of a presentment depends on whether Irregular
 reasonable diligence has been exercised or not. In presentment.
 America the rule is the same as in England, though perhaps it is rather more laxly applied. See the authorities collected in the note to *Berg v. Abbott* (*b*). It has been held in America that if the payor has a known residence a presentment to him in the street is insufficient, unless he waive the irregularity and refuse payment on some other ground (*c*). It has also been held that where no place of payment is specified in a note all the parties may orally agree upon a place, and that a presentment there is sufficient to charge the indorser (*d*). If the payor cannot be found the question is whether due diligence has been used in the endeavour to find him and make presentment. See sect. 46 (2). Most of the foreign codes contain explicit provisions as to what is to be done in that case (*e*).

46. (1) Delay in making presentment for pay- Excuses for
 ment is excused when the delay is caused by delay or non-
 circumstances beyond the control of the holder, presentment
 and not imputable to his default, misconduct, or for payment.
 negligence. When the cause of delay ceases to
 operate presentment must be made with reason-
 able diligence (*f*).

(*a*) See *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428, at p. 432; *Prideaux v. Criddle* (1869), L. R. 4 Q. B. at p. 461; *Windham Bank v. Morton* (1852), 22 Connecticut R. 214; *Paget on Banking*, ed. 2, p. 291.

(*b*) *Berg v. Abbott* (1877), 24 Amer. R. 158.

(*c*) *King v. Holmes* (1849), 11 Pennsylv. R. 456.

(*d*) *Meyer v. Hibsher* (1872), 47 New York R. 265.

(*e*) See, e.g., German Exchange Law, Art. 91; Netherlands Code, Art. 180.

(*f*) *Pothier*, No. 144; *Nouguier*, §§ 1107, 1108; *Story*, § 327; cf. *Rothschild v. Currie* (1841), 1 Q. B. at p. 47; New York Negotiable Instruments Law, § 141.

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ILLUSTRATIONS.

1. The holder of a bill dies suddenly just before it matures. The circumstances may be such as to excuse delay (*g*).

2. Bill drawn in England, payable in Leghorn. At the time the bill matures Leghorn is besieged. The holder is not in Leghorn. This excuses delay (*h*).

3. Bill presented for payment through the post (see sect. 45 (8)). It is sent off in time to reach the drawee on the day of maturity, but by mistake of the post-office is delayed some days. The delay is (probably) excused (*i*).

4. Bill drawn in England, payable in Paris. By a French moratory law, passed in consequence of war, the maturity of bills payable in Paris is postponed three months. The delay in making presentment is excused (*k*).

The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but when the question is one of reasonable diligence the distinction is an important one (*l*). If presentment is delayed at the request of the drawer or indorser sought to be charged, the delay is presumably excused (*m*).

Excuses for
non-present-
ment for
payment.

(2) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person (*n*).

(*g*) *Williams on Executors*, 10th ed. p. 1535, n.

(*h*) *Patience v. Townley* (1805), 2 Smith, 223.

(*i*) *Windham Bank v. Morton* (1852), 22 Connecticut R. 214; *Pier v. Heinrichschoffer* (1877), 29 Amer. R. 501; cf. sect. 49 (15), *post*.

(*k*) *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *Re Francke and Rasch*, (1918) 1 Ch. 470 (German Moratory Law).

(*l*) Cf. *Allen v. Edmundson* (1848), 2 Exch. at p. 724, notice of dishonour.

(*m*) *Lord Ward v. Oxford Railway Co.* (1852), 2 De G. M. & G. 750.

(*n*) *Smith v. Bellamy* (1817), 2 Stark. 223; *New York Negotiable Instruments Law*, § 142.

ILLUSTRATIONS.

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1. Bill drawn on B. is accepted by an agent. At the time the bill matures B. is abroad. This is no excuse, presentment should be made to the agent (*o*).

2. B. makes a note "Payable at Guildford." B. has no residence there. The bill is presented at two banks, and then treated as dishonoured. This is sufficient (*p*).

3. The drawer of a bill orders the acceptor not to pay it. The holder hears of this. Presentment is not dispensed with (*q*).

4. The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with (*r*).

5. The acceptor of a bill becomes bankrupt before it matures. Presentment is not excused (*s*).

6. B. makes a note payable at "1, X. Street, London." Before it becomes due he becomes insolvent and absconds. Presentment at 1, X. Street, is not dispensed with (*t*).

This sub-section is declaratory (*u*). In some American States there is a tendency to dispense with the attempt to make presentment when such attempt would be futile (*x*). This tendency is of doubtful expediency, and finds no favour in England. Compare sect. 45 (5), and sect. 50 (2), and notes thereto.

As to delay in presentment for payment of bills payable outside the British Islands, where the delay is due to circumstances arising out of the war, see sects. 1 and 3 of the Bills of Exchange Act, 1914 (4 & 5 Geo. 5, c. 82), *post*, p. 413.

The fact that the drawee is a person not having capacity to contract does not excuse presentment for payment, unless the case falls within the next clause, though it does excuse presentment for acceptance: see sect. 41 (2), *ante*.

(*o*) *Philips v. Astling* (1809), 2 Taunt. 206.

(*p*) *Hardy v. Woodroffe* (1818), 2 Stark. 319.

(*q*) *Hill v. Heap* (1823), D. & R. N. P. C. 57; cf. *Nicholson v. Gouihit* (1796), 2 H. Bl. 609.

(*r*) *Baker v. Birch* (1811), 3 Camp. 107; *Ex parte Bignold* (1836), 1 Deac. 712.

(*s*) *Esdale v. Sowerby* (1809), 11 East, at p. 117; *Bowes v. Howe* (1813), 5 Taunt. 30, Ex. Ch.; *Pothier*, No. 147. *Aliter* as to presentment for acceptance, see sect. 41 (2), *ante*.

(*t*) *Sands v. Clarke* (1849), 19 L. J. C. P. 84; *Pierce v. Cate* (1853), 66 Massachus. R. 190.

(*u*) Cf. *Pothier*, Nos. 144—147; *Re East of England Banking Co.* (1868), L. R. 4 Ch. at p. 18; New York Negotiable Instruments Law, § 142.

(*x*) See, e.g., *Foster v. Julien* (1861), 24 New York R. 28.

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- (c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (*y*).
- (d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented (*z*).

ILLUSTRATIONS.

1. Bill payable to drawer's order is accepted and indorsed to accommodate the drawer. The drawer discounts it, but does not provide the acceptor with funds to meet it at maturity. Presentment is not necessary to charge the drawer (*a*), but is necessary to charge the accommodation indorser (*b*).

2. A cheque is drawn on the Union Bank, the drawer not having sufficient funds there to meet it, and having no reason to expect that it will be honoured. Presentment is not necessary to charge the drawer (*c*).

Compare sect. 50 (2) (c) and (d), *post*, and notes thereto; also *Pothier*, No. 157.

Waiver.

- (e) By waiver of presentment, express or implied (*d*).

Compare sect. 50 (2) (b), *post*, as to notice of dishonour. The waiver may be either before or after the time for presentment. As to express stipulation in the bill waiving presentment, see sect. 16 (2), *ante*. Waiver of notice of

(*y*) Cf. New York Negotiable Instruments Law, § 139.

(*z*) New York Negotiable Instruments Law, § 140.

(*a*) *Terry v. Parker* (1837), 6 A. & E. 502.

(*b*) *Saul v. Jones* (1858), 28 L. J. Q. B. 37; cf. *Turner v. Samson* (1876), 2 Q. B. D. 23, C. A.

(*c*) *Wirth v. Austin* (1875), L. R. 10 C. P. 689; cf. *Re Bethell* (1887), W. N. p. 17.

(*d*) *Hopley v. Dufresne* (1812), 15 East, 275; cf. *Ex parte Bignold* (1836), 1 Deac. at p. 737; *Sheldon v. Horton* (1870), 43 New York R. 93; New York Negotiable Instruments Law, § 142, and cases cited in *Crawford's* edition.

dishonour does not of itself include a waiver of presentment for payment (*e*). German Exchange Law, Art. 42, provides that when the drawer or indorser inserts the term "Protest waived," presentment for payment is not waived thereby, but it lies on such drawer or indorser to prove that the bill has not been duly presented.

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See further sect. 51 (6) (*b*), *post*, as to protest of bill previously dishonoured by non-acceptance.

47. (1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid. Dishonour by non-payment.

(2) Subject to the provisions of this Act (*f*), when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorser accrues to the holder.

ILLUSTRATION.

An accepted bill is presented for payment and dishonoured. The holder can at once give notice of dishonour to the drawer and indorsers, but he cannot commence an action against the acceptor till the next day (*g*).

This is declaratory (*h*). As a general rule the holder's right of *action* against a drawer or indorser dates from the time when notice of dishonour is or ought to be received and not from the time when it is sent (*i*); and in

(*e*) *Hill v. Heap* (1823), D. & R. N. P. C. 57. So held also in Louisiana, *Wilkins v. Dawes* (1862), 20 La. An. 538; *aliter*, in New York, *Caddington v. Davis* (1848), 1 New York R. 187.

(*f*) See sects. 65—68, acceptance and payment for honour.

(*g*) *Kennedy v. Thomas*, (1894) 2 Q. B. 759, C. A.; cf. *Gelmini v. Moriggia*, (1913) 2 K. B. 549, at p. 552 (Statute of Limitations). The law in the United States appears to be the same.

(*h*) *Ex parte Moline* (1812), 1 Rose, 303; *Siggers v. Lewis* (1834), 1 C. M. & R. 370; New York Negotiable Instruments Law, §§ 143, 144.

(*i*) *Castrique v. Bernabo* (1844), 6 Q. B. 498; see note on Statute of Limitations, *post*, p. 336.

§ 47. any case there is no right of action till the day after dishonour. The right of recourse must be distinguished from the right of action (*k*).

Presentment for Payment to Charge Stranger to Bill.

Presentment
to charge
stranger.

Presentment for payment is not generally a condition precedent to the liability of a person who has given a guarantee for the payment of a bill by the acceptor (*l*). The reason is that presentment is not necessary to charge the acceptor or maker (sect. 52 (1)). If the drawer were the party guaranteed, or, perhaps, if the acceptance were qualified, presentment would be necessary.

A person who is not a party to a bill, but who is liable on the consideration for which it is given, is, it seems, discharged by the holder's omission to present it for payment (*m*). The same diligence is not requisite in this case as is necessary to charge a party to the instrument. It is sufficient that the holder does what is reasonable to obtain payment (*n*).

Notice of dis-
honour and
effect of non-
notice.

48. Subject to the provisions of this Act (*o*), when a bill has been dishonoured by non-acceptance or by non-payment (*p*), notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom

(*k*) *Kennedy v. Thomas*, (1894) 2 Q. B. 759, C. A.

(*l*) *Walton v. Mascoll* (1844), 13 M. & W. 452; *Nouguier*, § 1192; cf. *Hitchcock v. Humfrey* (1843), 5 M. & Gr. 559; *Black v. Ottoman Bank* (1862), 15 Moore, P. C. 472, 484; *Carter v. White* (1883), 25 Ch. D. 666, C. A.

(*m*) *Anderton v. Beck* (1812), 16 East, 248; *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; cf. *Straker v. Graham* (1839), 4 M. & W. 721, presentment for acceptance. *Qu.* whether this is an absolute rule, or whether the defendant must show that he has been prejudiced by the omission?

(*n*) *Sands v. Clarke* (1849), 8 C. B. at p. 761, Maule, J.; *Smith v. N. S. Wales Bank* (1872), 8 Moore, P. C. N. S. at pp. 461—463, Mellish, L.J. See, e.g., *Robson v. Oliver* (1847), 10 Q. B. 704, at p. 717.

(*o*) See sect. 50, excuses for non-notice and delay.

(*p*) Cf. sects. 43 and 47, defining dishonour by non-acceptance and non-payment.

such notice is not given is discharged (*q*); Provided that— § 48.

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course (*r*) subsequent to the omission, shall not be prejudiced by the omission (*s*).

(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted (*t*).

ILLUSTRATION.

A bill bearing indorsement is dishonoured, and the holder gives notice of dishonour to the indorser but not to the drawer. If the indorser in turn sends a notice of dishonour to the drawer, the holder can sue both indorser and drawer. If this be not done the holder can sue the indorser, but the indorser cannot sue the drawer (*u*).

“Notice of dishonour” means notification of dishonour, *i.e.*, formal notice (*x*). The fact that the drawer or indorser of a bill knows that it has been dishonoured does not dispense with the necessity of giving him notice of dishonour (*y*). *Pothier* (No. 147), speaking of protests, lays down a similar rule: “la raison est que

(*q*) *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. at p. 642. New York Negotiable Instruments Law, § 160.

(*r*) See sect. 29, defining holder in due course.

(*s*) *Roscow v. Hardy* (1810), 12 East, 434; *Dunn v. O’Keeffe* (1816), 5 M. & S. 282. New York Negotiable Instruments Law, § 188.

(*t*) New York Negotiable Instruments Law, § 187; *Campbell v. French* (1795), 6 T. R. 200.

(*u*) Cf. *Rickford v. Ridge* (1810), 2 Camp. at p. 538; *Miers v. Brown* (1843), 11 M. & W. 372; sect. 49 (3), (4), *post*.

(*x*) *Burgh v. Legge* (1839), 5 M. & W. at p. 422, Alderson, B.; *Carter v. Flower* (1847), 16 M. & W. at p. 749, Parke, B.; cf. *Re Fenwick, Stobart & Co.*, (1902) 1 Ch. 507.

(*y*) *Miers v. Brown* (1843), 11 M. & W. 372; *East v. Smith* (1847), 16 L. J. Q. B. 292; cf. *Caunt v. Thompson* (1849), 18 L. J. Q. B. 125.

§ 48. les formalités établies par les lois pour donner à quelqu'un la connaissance de quelque fait, ne se suppléent point, et ne s'accomplissent pas par équipollence." As regards notes and inland bills, notice of dishonour is the English substitute for protest (*z*). As regards foreign bills notice of dishonour is supplementary to protest (*a*). Under the continental codes notice of protest must be given within fixed limits of time (*b*).

Rules as to
notice of
dishonour.

By whom to
be given.

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules (*c*):—

- (1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill (*d*).
- (2) Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not (*e*).

ILLUSTRATIONS.

1. A bill indorsed by C. and held by D. is dishonoured. X., who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D.'s behalf, informs C. that the bill has been dishonoured. This is not sufficient; C. is discharged (*f*).

(*z*) *Solaro v. Palmer* (1833), 7 Bing. at p. 533.

(*a*) *Ex parte Lowenthal* (1874), L. R. 9 Ch. 591. The notice is not bad because it does not state that the bill has been protested.

(*b*) Cf. French Code, Arts. 166—170; German Exchange Law, Arts. 45—47.

(*c*) The fifteen rules which follow are declaratory, except that rules 5 and 6 somewhat modify the stringency of the common law. Cf. *Bickerdike v. Bollman*, 1 Smith, Lead. Cas. 11th ed. and notes thereto.

(*d*) See *Chapman v. Keane* (1835), 3 A. & E. 193; *Story*, § 304; cf. *Harrison v. Ruscoe* (1846), 15 M. & W. at pp. 234, 236; cf. New York Negotiable Instruments Law, § 161.

(*e*) Cf. *Harrison v. Ruscoe* (1846), 15 M. & W. at p. 235; New York Negotiable Instruments Law, § 162.

(*f*) *Stewart v. Kennett* (1809), 2 Camp. 177; cf. *East v. Smith* (1847), 16 L. J. Q. B. 292.

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2. C. is the first indorser of a dishonoured bill held by D. D. gives notice to C. one day late. C., on the *same* day, gives notice to the drawer; thus, as it were, making up for the lost day. This notice is ineffectual; for C., having been discharged by the holder's delay, is a mere stranger (*g*).

3. A bill indorsed by C. is held by D. D.'s attorney gives notice of dishonour to the drawer, but by mistake gives it in C.'s name instead of D.'s. The notice is sufficient, provided C. is liable to D., and has a right of recourse against the drawer (*h*).

4. C., the indorser of a bill, holds it as agent for the indorsee. C. presents it for payment, and it is dishonoured. Notice of dishonour given by C. in his own name is sufficient (*i*).

A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonour (*k*).

Notice of dishonour may be given by the party entitled to give it either personally, or by messenger or other agent (*l*), or through the post-office (*m*). By subsect. (15), *post*, when notice of dishonour is sent by post the sender is not prejudiced by the delay or default of the post-office, but is deemed to have given due notice of dishonour (*n*). It lies on the sender to prove that the letter containing the notice was duly addressed and posted (*o*). The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence (*p*). When, however,

(*g*) *Turner v. Leech* (1821), 4 B. & Ald. 451.

(*h*) *Harrison v. Ruscoe* (1846), 15 M. & W. 231.

(*i*) *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160.

(*k*) *Rosher v. Kieran* (1814), 4 Camp. 87, as modified by *Harrison v. Ruscoe* (1846), 15 M. & W. at p. 235; cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. at p. 255, Erle, J.; see *Stanton v. Blossom* (1817), 14 Massachus. R. 116, where drawee had no authority, and notice was held bad.

(*l*) Cf. *Pearson v. Crallan* (1805), 2 Smith, 404, as to messenger's expenses.

(*m*) *Stocken v. Collin* (1841), 7 M. & W. 515.

(*n*) *Woodcock v. Houldsworth* (1846), 16 M. & W. 124, delay; *Mackay v. Judkins* (1858), 1 F. & F. 208, loss, Byles, J.; *Renwick v. Tighe* (1860), 8 W. R. 391, loss.

(*o*) *Hawkes v. Salter* (1828), 4 Bing. 715; cf. *Skilbeck v. Garbett* (1845), 7 Q. B. 846.

(*p*) *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. 639.

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the bill contains an address it seems that such address is in any case sufficient to charge the party giving that address (*q*). German Exchange Law, Art. 47, provides that when an indorser does not state his address notice may be sent to the indorser who precedes him. When a bill is presented for payment through the post-office (see sect. 45 (8)), the drawee or acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonour (*r*). If the holder does not promptly get an answer from the drawee, it would be prudent for him at once to give notice of dishonour himself.

For whose
benefit notice
enures.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given (*s*).

(4) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided (*t*), it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given (*u*).

In what
manner to
be given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms (*x*) which sufficiently identify the bill (*y*), and intimate that the bill has been

(*q*) *Burmester v. Barron* (1852), 17 Q. B. 828; cf. *Ex parte Baker* (1877), 4 Ch. D. at p. 799, C. A.

(*r*) Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. at p. 255; *Prideaux v. Criddle*, L. R. 4 Q. B. at p. 461; *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428.

(*s*) See *Stafford v. Gates* (1820), 18 Johns. 327, New York; New York Negotiable Instruments Law, § 163.

(*t*) See sub-sect. (1), and *Turner v. Leech* (1821), 4 B. & Ald. 451.

(*u*) *Chapman v. Keane* (1835), 3 A. & E. 193; *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160; *Streeter v. Fort Bank* (1866), 34 New York R. 413; New York Negotiable Instruments Law, § 164.

(*x*) *Caunt v. Thompson* (1849), 18 L. J. C. P. at p. 127; see also sub-sect. (7), *post*, and note thereto.

(*y*) *Shelton v. Braithwaite* (1841), 7 M. & W. 436; *Gates v. Beecher* 1875), 60 New York R. at p. 527.

dishonoured by non-acceptance or non-payment (*z*). § 49.

ILLUSTRATIONS.

1. "I give notice that a bill, &c. (description), indorsed by you, lies at 1, X. Street, dishonoured." Sufficient (*a*).

2. The holder's clerk wrote to an indorser that "B.'s acceptance due that day was unpaid, and requested his immediate attention to it." Sufficient (*b*).

3. "Your draft which became due yesterday is unpaid. Unless the same is paid immediately I shall take proceedings. Noting 5s." Sufficient (*c*).

4. The following notice left at the drawer's counting-house by the holder's clerk: "B.'s acceptance to A., 50*l.*, due January 1, is unpaid. Payment to D. is requested before 4 p.m." Sufficient (*d*).

5. "D. Bank. I beg to intimate that B.'s acceptance to you due 1st January is still unpaid, and I have to request your immediate attention to the same." No signature. Sufficient (*e*).

6. Notice to drawer of bill accepted by B. "Yours and B.'s note of hand is now due, and your attention to the same will oblige." Sufficient (*f*).

This sub-section originally ended with the words, "and that the party to whom notice is given is held liable." These words are struck out in committee. Notices of dishonour are now construed very liberally. In 1834 the House of Lords, in *Solarte v. Palmer* (*g*), decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonoured. This inconvenient decision was frequently regretted (*h*), and was eventually got rid of by

(*z*) *Everard v. Watson* (1853), 1 E. & B. at p. 804, per Ld. Campbell; New York Negotiable Instruments Law, § 167. The notice need not expressly state that the bill has been presented and dishonoured (*Paul v. Joel* (1859), 28 L. J. Ex. 143, nor that it has been protested, if protest be necessary (*Ex parte Lowenthal* (1874), L. R. 9 Ch. 591).

(*a*) *King v. Bickley* (1842), 2 Q. B. 419.

(*b*) *Bailey v. Porter* (1845), 14 M. & W. 44, notice lost, and secondary evidence given of contents.

(*c*) *Armstrong v. Christiani* (1848), 5 C. B. 687; *Everard v. Watson* (1853), 1 E. & B. 801.

(*d*) *Paul v. Joel* (1858), 27 L. J. Ex. 380; affirmed (1859), 28 L. J. Ex. 143.

(*e*) *Maxwell v. Brain* (1864), 10 L. T. N. S. 301.

(*f*) *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

(*g*) *Solarte v. Palmer* (1834), 1 Bing. N. C. 194.

(*h*) See, e.g., *Everard v. Watson* (1853), 1 E. & B. at p. 804.

§ 49. considering it merely as a finding on the particular facts (*i*). Since 1841 (*k*) it does not appear that any written notice of dishonour has been held bad on the ground of insufficiency in form.

For suggested forms of notice of dishonour, see Appendix, *post*, p. 383.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

This sub-section approves a common practice of collecting bankers which was previously of doubtful validity.

Form.

(7) A written notice need not be signed (*l*), and an insufficient written notice may be supplemented and validated by verbal communication (*m*). A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby (*n*).

ILLUSTRATIONS.

1. A person sent by the holder goes to the house of the drawer, who is not a trader, and not finding the drawer, informs his wife that he has brought back the bill dishonoured. The wife says she will tell her husband. This may be sufficient (*o*).

2. The holder's clerk goes to the drawer and tells him that his bill has been presented, and that the acceptor cannot pay it.

(*i*) *Paul v. Joel* (1858), 27 L. J. Ex. at p. 384.

(*k*) See *Furze v. Sharwood* (1841), 2 Q. B. 388, where the notice would now probably be sufficient.

(*l*) *Maxwell v. Brain* (1864), 10 L. T. N. S. 301; but it must come from the right person: see sub-sects. (1) and (2).

(*m*) *Houlditch v. Cauty* (1838), 4 Bing. N. C. 411, at p. 419. The sufficiency or insufficiency in such case is a question of fact: *Ibid.*, and see *Metcalfe v. Richardson* (1852), 11 C. B. 1011, as to verbal notice.

(*n*) New York Negotiable Instruments Law, § 167, and cases in *Crawford's* edition.

(*o*) *Housego v. Cowne* (1837), 2 M. & W. 348.

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The drawer replies that he will see the holder about it. This may be sufficient (*p*).

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3. A notary's clerk takes the bill, with the notary's ticket attached, to the drawer's office, and shows it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. This may be sufficient (*q*).

4. A notice to the drawer which describes the bill as payable at the "S. Bank," when in fact it was payable at the "T. Bank" (*r*), or which describes a bill of exchange as a note (*s*), or which transposes the names of drawer and acceptor (*t*), or which describes the acceptor by a wrong name (*u*), may be sufficient.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf (*x*).

To whom notice of dishonour must be given.

ILLUSTRATIONS.

1. C. is the indorser of a bill which is dishonoured. Verbal notice given to his solicitor is not sufficient (*y*).

2. X., who has authority to indorse for C., indorses a bill in C.'s name. Notice of dishonour given to X. is (perhaps) sufficient (*z*).

3. The drawer of a bill is a non-trader. Verbal notice of dishonour given to his wife at his house, in his absence, may be sufficient (*a*).

4. The indorser of a bill is a merchant. Notice of dishonour, verbal or written, given to or left with a clerk at his counting-house is sufficient (*b*).

5. C. indorses a bill "In need at Messrs. X. & Co." Notice of dishonour given to X. & Co. is not sufficient to charge C. (*c*).

(*p*) *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

(*q*) *Viale v. Michael* (1874), 30 L. T. N. S. 453. For further illustrations, see *East v. Smith* (1847), 16 L. J. Q. B. 292; *Chard v. Fox* (1849), 14 Q. B. 200; *Jennings v. Roberts* (1855), 24 L. J. Q. B. 102.

(*r*) *Bromage v. Vaughan* (1846), 16 L. J. Q. B. 10.

(*s*) *Stockman v. Parr* (1843), 11 M. & W. 809; *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

(*t*) *Mellersh v. Rippen* (1852), 7 Exch. 578.

(*u*) *Harpham v. Child* (1859), 1 F. & F. 652.

(*x*) New York Negotiable Instruments Law, § 168.

(*y*) *Crosse v. Smith* (1813), 1 M. & S. at p. 554.

(*z*) Cf. *Firth v. Thrush* (1828), 8 B. & C. at p. 391.

(*a*) *Housego v. Cowne* (1837), 2 M. & W. 348; cf. *Wharton v. Wright* (1844), 1 C. & K. 585.

(*b*) *Allen v. Edmundson* (1848), 2 Exch. at p. 724; *Viale v. Michael* (1874), 30 L. T. N. S. 453.

(*c*) *Ex parte Prange, Re Leeds Bank* (1865), L. R. 1 Eq. at p. 5.

§ 49.

It is the duty of the drawer or indorser of a bill, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf (*d*).

- (9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

This is probably declaratory, though there was no English decision in point. It has been held in New York that notice sent to an indorser in ignorance of his death is sufficient (*e*). The Act appears to affirm this view.

- (10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee (*f*).
- (11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others (*g*).

- (12) The notice may be given as soon as the

Within what
time notice of

(*d*) Cf. *Allen v. Edmundson* (1848), 2 Exch. at p. 723.

(*e*) *Merchants Bank v. Birch* (1817), 17 Johns. R. 24; cf. New York Negotiable Instruments Law, § 169, which reproduces subsect. (9) and adds, "If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased."

(*f*) Cf. New York Negotiable Instruments Law, § 172, which is rather wider. See "bankrupt" defined by sect. 2, *ante*.

(*g*) Cf. New York Negotiable Instruments Law, §§ 170, 171. Bill drawn by partners, but dishonoured after dissolution. Notice to one is sufficient, per Channell, J., unreported.

bill is dishonoured (*h*), and must be given § 49.
within a reasonable time thereafter (*i*).

dishonour
must be
given.

In the absence of special circumstances (*k*) notice is not deemed to have been given within a reasonable time, unless—

- (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill (*l*);
- (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day (*m*), and if there be no such post on that day then by the next post thereafter (*n*).

Reasonable time will, as heretofore, be a mixed question of law and fact (*o*). By sect. 92, *post*, when the time allowed for doing any act is less than three days, non-business days are excluded (*p*).

(*h*) *Burbridge v. Manners* (1812), 3 Camp. 193; *Hine v. Allely* (1833), 4 B. & Ad. 624; *Kennedy v. Thomas*, (1894) 2 Q. B. 759.

(*i*) *Hirschfield v. Smith* (1866), L. R. 1 C. P. at p. 351; New York Negotiable Instruments Law, §§ 173, 174, lay down rather a stricter rule.

(*k*) See, e.g., *The Elmville*, (1904) P. 319 (bill drawn by master of ship and whereabouts of ship not known). As to a Jewish sacred festival, see *Lindo v. Unsworth* (1811), 2 Camp. 601.

(*l*) *Smith v. Mullett* (1809), 2 Camp. 208; *Hilton v. Fairclough* (1811), 2 Camp. 632.

(*m*) *Williams v. Smith* (1819), 2 B. & Ald. at p. 500.

(*n*) *Hawkes v. Salter* (1828), 4 Bing. 715; *Carter v. Burley* (1838), 9 New Hamp. R. 558, at p. 570.

(*o*) *Hirschfield v. Smith* (1866), L. R. 1 C. P. at p. 351; cf. *Gladwell v. Turner* (1870), L. R. 5 Ex. at p. 61.

(*p*) Cf. *Wright v. Shawcross* (1819), cited 2 B. & Ald. at p. 501, as to notice received on a Sunday; and Bank Holidays Act, 1871, s. 2, *post*, p. 389.

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A person who gives notice to a remote party must give notice within the same limits of time that would suffice in the case of an immediate party (*q*). If the holder does not give notice to a remote party in due time, he cannot rely on his own notice; but if he has given due notice to his immediate indorser, his rights may yet be saved by notice given by such indorser.

Under French Code, Art. 165, the holder of a dishonoured bill must give notice of protest and commence proceedings within fifteen days of the date of protest, if the drawer or indorser sought to be charged live within five myriametres. Extra time is given for extra distance. Thus, under Art. 166, as modified by the law of May 3, 1862, when a bill is payable in England the holder has one month for giving notice of protest and commencing proceedings against a French drawer or indorser. The notice of protest and the summons (*assignation en justice*) are usually comprised in one document: *Nouguier*, §§ 1088, 1089. Under German Exchange Law, Art. 45, and several other continental codes, the holder must send off written notice of protest within two days after protest.

Agents.

- (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the party liable on the bill or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder (*r*).

ILLUSTRATIONS.

1. A bill payable in London is indorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presents it for payment and gives him due

(*q*) *Rowe v. Tipper* (1853), 22 L. J. C. P. 135; cf. *Nouguier*, § 1096.

(*r*) New York Negotiable Instruments Law, § 165.

notice of its dishonour. The country banker on the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his indorser. This indorser has received due notice (s).

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2. C. indorses a bill to the Liverpool branch of the D. Bank. The Liverpool branch sends it to the Manchester branch, and the Manchester branch endorses it to the head office in London, who present it for payment. The head office sends notice of dishonour to the Manchester branch, the Manchester branch sends notice to the Liverpool branch, who gives notice to C. Each branch as regards time is to be considered a distinct party (t).

3. X. pays a bill *suprà protest* for the honour of C., an indorser, who resides at Bruges, and the same day posts the bill to C. C. by return of post sends the bill back to X., who at once gives notice of dishonour to the drawer. Although six days have elapsed since the dishonour, the notice is in time, and X. can sue the drawer (u).

4. A bill bearing several indorsements is sent to a branch bank for collection. The branch bank forwards it to a London bank, who on the day that it is dishonoured, give notice by error to another branch of the forwarding bank. Next day, notice is sent to the right branch bank by wire, and the subsequent notices of dishonour are given in due time. The first indorser of the bill cannot rely on the defence that the first notice of dishonour was out of time (x).

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour (y). Remote parties.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office (z). Miscarriage of post office.

(s) *Bray v. Hadwen* (1816), 5 M. & S. 68; cf. *Firth v. Thrush* (1828), 8 B. & C. 387.

(t) *Clode v. Bayley* (1843), 12 M. & W. 51, approved *Prince v. Oriental Bank* (1878), 3 App. Cas. at p. 332, P. O.

(u) *Goodall v. Polhill* (1845), 14 L. J. C. P. 146.

(x) *Fielding & Co. v. Corry*, (1898) 1 Q. B. 268, C. A.

(y) See *Wright v. Shawcross* (1819), cited 2 B. & Ald. at p. 501, notice received on Sunday; and see *ante*, p. 183, and New York Negotiable Instruments Law, § 178.

(z) See note to sub-sect. (2), *ante*, and cf. New York Negotiable Instruments Law, § 177.

§ 50.

Excuses for
delay in
giving notice
of dishonour.

50. (1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence (*a*).

ILLUSTRATION.

Bill drawn by master of ship on his owners is dishonoured on Saturday. The holder's banker who presented the bill informs him of this on Monday. The holder takes till Thursday in making inquiries as to where the ship is, and then gives notice to the drawer by registered post. The notice is in time, and the delay caused by making inquiry is excused (*b*).

Compare sect. 46 (1) as to delay in presentment for payment, and sect. 51 (9) as to delay in protest. If an indorser gives a wrong address, delay caused by his so doing would be excused (*c*); and if the holder does not know an indorser's address, delay occupied in making inquiries would be excused (*d*); so, too, by sect. 49 (15), delay caused by the default of the post office is excused. This sub-section, which is declaratory (*e*), is an obvious deduction from the general rule that notice of dishonour must be given within a reasonable time. The old system of pleading recognized the distinction between excuses for delay and excuses for non-notice (*f*). When the delay is caused by the negligence of the party to whom notice is sent, it is conceived that, though that party is liable, he cannot give an effectual notice to antecedent parties (*g*).

(*a*) See *Firth v. Thrush* (1828), 8 B. & C. 387; *Gladwell v. Turner* (1870), L. R. 5 Ex. at p. 61; and the notice must be given *before action*, *Studdy v. Beesty* (1889), 60 L. T. N. S. 647, C. A.; cf. New York Negotiable Instruments Law, § 184.

(*b*) *The Elmville*, (1904) P. 319.

(*c*) *Hewitt v. Thompson* (1836), 1 M. & Rob. 541; *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. 639.

(*d*) *Baldwin v. Richardson* (1823), 1 B. & C. 245.

(*e*) *Studdy v. Beesty* (1889), 60 L. T. N. S. 647; (1889), W. N. p. 14, C. A.

(*f*) *Allen v. Edmundson* (1848), 2 Exch. at p. 723.

(*g*) Cf. *Shelton v. Braithwaite* (1841), 8 M. & W. at pp. 254, 255.

As to notice to indorser who has indorsed a bill when
overdue, see note to sect. 10 (2), *ante*. § 50.

- (2) Notice of dishonour is dispensed with (*h*)—
(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged : When notice of dishonour dispensed with.

ILLUSTRATIONS.

1. The holder of a dishonoured bill goes to the drawer's place of business during business hours to give him notice of dishonour. He finds the place shut, and no one there of whom to make inquiries. This may excuse notice (*i*).

2. The holder of a bill duly addresses and posts a notice of dishonour. It is lost in the post. The drawer or indorser to whom it was sent is not discharged (*k*).

3. The holder of a dishonoured bill does not know the indorser's address. He makes some inquiry, but does not take the steps he reasonably might have done (*l*). The indorser is discharged (*m*).

4. A bill is accidentally destroyed before maturity. The holder gives notice of the fact to the drawer. At maturity the holder cannot obtain payment. He must give notice of dishonour to the drawer (*n*).

5. Action by indorsee against drawer. The drawer cannot be found at the address given, but subsequently is found at another address. This excuses delay in giving notice, but not the omission to give notice of dishonour (*o*).

The fact that the drawer or indorser sought to be charged has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for giving him notice of dishonour (*p*). Thus, if

(*h*) Comparing this sub-section with the corresponding provisions of sect. 46 (2), it will be seen that notice of dishonour is dispensed with in several cases when presentment for payment is not.

(*i*) *Allen v. Edmundson* (1848), 2 Exch. at p. 723; discussed *Studdy v. Beesty* (1889), 60 L. T. N. S. at p. 649, C. A.

(*k*) *Mackay v. Judkins* (1858), 1 F. & F. 208, Byles, J.; cf. sect. 49 (15), *ante*.

(*l*) *Allen v. Edmundson* (1848), 2 Exch. at p. 723; discussed *Studdy v. Beesty* (1889), 60 L. T. N. S. at p. 649, C. A.

(*m*) *Beveridge v. Burgis* (1812), 3 Camp. 262.

(*n*) *Thackray v. Blackett* (1811), 3 Camp. 164.

(*o*) *Studdy v. Beesty* (1889), 60 L. T. N. S. 647, C. A.

(*p*) *Carew v. Duckworth* (1869), L. R. 4 Ex. at p. 319.

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the drawer or indorser of a bill knows that the acceptor is dead (*q*) or bankrupt (*r*), notice must still be given; so, too, if the drawer or indorser be dead or bankrupt: sect. 49 (9), (10), *ante*. Reasonable diligence is a question of fact (*s*).

When notice
of dishonour
dispensed
with.

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice (*t*).

ILLUSTRATIONS.

1. The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. This waives notice (*u*).

2. The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice (*x*).

3. The indorser of a bill receives no notice of dishonour. Six weeks after the dishonour he meets the holder and promises to pay the bill. This is a waiver of notice (*y*).

4. The drawer of a bill indorses it to C., who indorses it to D. On the day of dishonour, but before the fact of dishonour could be known, the drawer, knowing the acceptor to be insolvent, says to C., "I suppose I shall have to take up the bill. If you will call with it in a few days I will pay you." D. gives no notice of dishonour either to C. or the drawer. D. cannot avail himself of the promise to C., and sue the drawer (*z*).

5. The drawer of a bill indorses it to C., who indorses it to D. Some time after the dishonour, the drawer, who has received no notice, is informed by C. that D., the holder, is going to sue him. The drawer says he will pay if D. will give him time. This is evidence of waiver of notice (*a*).

(*q*) *Caunt v. Thompson* (1849), 18 L. J. C. P. 125; French Code, Art. 163; *Pothier*, No. 147.

(*r*) *Esdaile v. Sowerby* (1809), 11 East, 114; cf. French Code, Art. 163.

(*s*) *Bateman v. Joseph* (1810), 2 Camp. at p. 462; cf. *Berridge v. Fitzgerald* (1869), L. R. 4 Q. B. at p. 642.

(*t*) New York Negotiable Instruments Law, § 180.

(*u*) *Phipson v. Kellner* (1815), 4 Camp. 285; cf. *Burgh v. Legge* (1839), 5 M. & W. 418.

(*x*) *Brett v. Levett* (1811), 13 East, at p. 214.

(*y*) *Cordery v. Colville* (1863), 32 L. J. C. P. 210.

(*z*) *Pickin v. Graham* (1833), 1 Cr. & M. 725.

(*a*) *Woods v. Dean* (1862), 32 L. J. Q. B. 1. See further, *Lecan v. Kirkman* (1859), 6 Jur. N. S. 17; *North Stafford Loan Co. v. Wythies* (1861), 2 F. & F. 563; *Kilby v. Rochussen* (1865), 18 C. B. N. S. 357; *Sheldon v. Horton* (1870), 43 New York R. 93.

6. Two companies have the same secretary. A bill is drawn by one company on the other, and is indorsed to C. The bill is dishonoured by the acceptors, and no notice is given to the drawers. There is no waiver. C. cannot recover on this bill, and the fact that the secretary knew that the bill was going to be dishonoured is immaterial (*b*).

§ 50.

When notice of dishonour dispensed with.

7. Bill dishonoured, and notice not given to indorser. The indorser makes a payment on account under the mistaken belief that she was a joint acceptor. This is not a waiver of notice (*c*).

Waiver of notice of dishonour in favour of the holder enures for the benefit of parties prior to such holder as well as subsequent holders (*d*).

Waiver of notice of dishonour by an indorser does not affect parties prior to such indorser (*e*).

An acknowledgment of liability must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonour (*f*). Thus, a bill is refused payment at maturity. The indorser promises the holder to pay it, not knowing that it had been previously dishonoured by non-acceptance. This is no waiver. Again, a waiver of notice of dishonour may not include a waiver of presentment for payment (*g*).

Many of the cases fail to distinguish between admissions of liability, which are evidence of due notice having been received, and admissions of liability when due notice has not been given, and which therefore are evidence of waiver. The distinction is important (*h*). In America it has been

(*b*) *Re Femvick, Stobart & Co.*, (1902) 1 Ch. 507; *aliter*, if it was the secretary's duty to give notice.

(*c*) *McTavish v. Michael's Trustees* (1912), S. C. 425, Court of Session.

(*d*) *Rabey v. Gilbert* (1861), 30 L. J. Ex. 170.

(*e*) *Turner v. Leech* (1821), 4 B. & Ald. 451; cf. New York Negotiable Instruments Law, § 181, as to construction of express waivers.

(*f*) *Goodall v. Dolley* (1787), 1 T. R. 712; cf. *Pickin v. Graham* (1833), 1 Cr. & M. at p. 729.

(*g*) *Keith v. Burke* (1885), 1 C. & E. 551.

(*h*) As to what is evidence of due notice, see *Taylor v. Jones* (1809), 2 Camp. 105; *Hicks v. Beaufort* (1838), 4 Bing. N. C. 229; *Brownell v. Bonney* (1841), 1 Q. B. 39; *Curlewis v. Corfield* (1841), 1 Q. B. 814; *Campbell v. Webster* (1845), 15 L. J. C. P. 4; *Mills v. Gibson* (1847), 16 L. J. C. P. 249; *Jackson v. Collins* (1848), 17 L. J. Q. B. 142; *Bartholomew v. Hill* (1862), 5 L. T. N. S. 756. As to what is not, *Borradaile v. Lowe* (1811), 4 Taunt. 93; *Braithwaite v. Coleman* (1835), 4 N. & M. 654; *Bell v. Frankis* (1842), 4 M. & G. 446; *Holmes v. Staines* (1850), 3 C. & K. 19.

§ 50.

When notice
of dishonour
dispensed
with.

As regards
drawer.

held that a verbal waiver of notice may be revoked before the time for giving notice has expired (*i*).

As to the insertion of an express stipulation in a bill waiving notice, see sect. 16 (2), *ante*.

- (c) As regards the drawer in the following cases, namely—(1) where drawer and drawee are the same person (*k*), (2) where the drawee is a fictitious person, or a person not having capacity to contract (*l*), (3) where the drawer is the person to whom the bill is presented for payment (*m*), (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (*n*), (5) where the drawer has countermanded payment (*o*) :

ILLUSTRATIONS.

1. Bill is made payable at the drawer's own house. It is accepted and dishonoured. *Primâ facie* this is a bill accepted for the accommodation of the drawer, and he is not entitled to notice (*p*).

2. A bill is signed by the drawer in order to accommodate the acceptor. The drawer is entitled to notice (*q*).

3. A. having the balance of 10*l*. at his bankers, and having no

(*i*) *Second Nat. Bank v. Maguire* (1877), 31 Amer. R. 539.

(*k*) See "person" defined by sect. 2, *ante*, and see sect. 5 (2), *ante*. *Qu.* as to case of two firms having a common partner, see *New York Contracting Co. v. Selma Savings Bank* (1874), 23 Amer. R. 552.

(*l*) See *Leuch v. Hewitt* (1813), 4 Taunt. 731; *Smith v. Bellamy* (1817), 2 Stark. 223, and sect. 5 (2), *ante*.

(*m*) See "person" defined by sect. 2, *ante*, and see sect. 5 (2), *ante*. *Qu.* as to the case of two firms having a partner in common, see *New York Contracting Co. v. Selma Savings Bank* (1874), 23 Amer. R. 552. See further, *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

(*n*) See *Bickerdike v. Bollman* (1786), 2 Smith, L. C. 11th ed. p. 102, and notes; *Dickens v. Beal* (1836), 10 Peters, 572, Sup. Ct. N. S.

(*o*) Cf. New York Negotiable Instruments Law, § 185.

(*p*) *Sharp v. Bailey* (1829), 9 B. & C. 44; cf. *Carter v. Flower* (1847), 16 M. & W. 743.

(*q*) *Sleigh v. Sleigh* (1850), 5 Exch. 514.

authority to overdraw, draws a cheque for 50*l*. A. is not entitled to notice (*r*).

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4. A bill is drawn and accepted to accommodate X. who is not a party to it, but who is to provide for it. The drawer is entitled to notice of dishonour (*s*).

When notice of dishonour dispensed with.

5. A., having a small balance in B.'s hands, draws on him for a larger sum. B. *accepts*, but does not pay. A. is perhaps entitled to notice (*t*).

6. A bill is drawn, accepted and indorsed by three persons in order to raise money for their joint benefit. The drawer and indorser are entitled to notice (*u*).

7. A. supplies goods to B. on six months' credit, and then proceeds to draw a bill on him payable two months after date. If B. refuses to accept, A. is not entitled to notice (*x*).

Primâ facie the acceptor is, as between himself and the drawer, the person bound to pay it; but evidence is admissible to show that he is in reality a mere surety for the drawer, or some other party (*y*).

As the clause originally stood, it ran, "where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, *and the drawer has no reason to expect that it will be honoured on presentment.*" These latter words were struck out in committee. Therefore the cases in which, before the Act, notice was held necessary on this ground, must be reconsidered with reference to this amendment.

- (d) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment,

As regards indorser.

(*r*) *Carew v. Duckworth* (1869), L. R. 4 Ex. 313; cf. *Wirth v. Austin* (1875), L. R. 10 C. P. 689.

(*s*) *Lafitte v. Slatter* (1830), 6 Bing. 623; cf. *Turner v. Samson* (1876), 2 Q. B. D. 23, C. A.

(*t*) *Thackray v. Blackett* (1811), 3 Camp. 164. *Qu.* since the Act?

(*u*) *Foster v. Parker* (1876), 2 C. P. D. 18; cf. *Maltass v. Sidle* (1859), 28 L. J. C. P. 257.

(*x*) *Claridge v. Dalton* (1815), 4 M. & S. 226.

(*y*) *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127.

§ 50.

When notice
of dishonour
dispensed
with.

(3) where the bill was accepted or made for his accommodation (z).

ILLUSTRATION.

The indorser of a bill becomes the executor of the acceptor. It is presented to him and he dishonours it. He is not entitled to notice (a).

See "person" defined by sect. 2, *ante*, and note the distinctions between this clause and the last. As the clause originally stood, it ran, "where the bill was accepted or made for his accommodation, *and he has no reason to expect that it will be honoured on presentment.*" The latter words were struck out in committee.

When a bill is dishonoured which is void for want of being duly stamped, notice of dishonour need not be given, for the holder's only remedy is in an action on the consideration, and not on the instrument itself (b).

Notice to charge Acceptor, Maker, or Stranger.

Notice to
acceptor
unnecessary.

By sect. 52 (3), *post*, the acceptor of a bill of exchange, or maker of a note, is not in any case entitled to notice of dishonour (c).

Guarantor.

A person who has given a guarantee for the payment of a bill by the acceptor is not entitled to notice of dishonour. Thus:—

1. The indorser of a bill gives a bond to secure its payment. Want of notice of dishonour is no defence to an action on the bond (d).

2. X. gives a guarantee for the price of goods to be supplied to the acceptor of a bill. X. is not entitled to notice of dishonour (e).

3. X. gives a guarantee for the price of goods to be supplied to the drawer of a bill. X. is entitled to notice of dishonour (f).

(z) New York Negotiable Instruments Law, § 186.

(a) *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

(b) *Cundy v. Marriott* (1831), 1 B. & Ad. 696.

(c) Cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at p. 137; *Pearse v. Pemberthy* (1812), 3 Camp. 261, maker of promissory note.

(d) *Murray v. King* (1821), 5 B. & Ald. 165.

(e) *Ho'brow v. Wilkins* (1822), 1 B. & C. 10.

(f) *Philips v. Astling* (1809), 2 Taunt. 206; cf. *Hitchcock v. Humfrey* (1843), 5 M. & Gr. at p. 564.

4. X. guarantees the payment of a note "if it be not duly honoured and paid" by the maker. X. is not entitled to notice of dishonour (*g*).

§ 50.

5. A debtor gave his creditor a bill accepted by himself, but with the drawer's name in blank. X. as surety deposited certain stock certificates with the creditor as collateral security. The acceptor died insolvent, without the creditor having inserted any drawer's name. The bill was never presented for payment, and no notice was given to X. Held that X. was not discharged (*h*).

In America the cases conflict. The balance of authority inclines to the view that notice of dishonour need not be given to a guarantor (*i*). It is prudent to give a guarantor some notice.

A person who is not a party to a bill, but who is liable on the consideration for which it is given, is (probably) entitled to notice of dishonour, if he is prejudiced by not getting notice. Thus:—

Person liable
on considera-
tion.

1. X. buys goods from D. to be paid for "by approved banker's bill." C., who is X.'s broker, obtains a banker's bill payable to his own order and indorses it to D. If the bill be dishonoured because it has not been promptly presented for acceptance, and the drawer has in the meantime failed, X. (probably) is not liable for the price of the goods, unless he receives notice of dishonour (*k*).

2. C., the *holder* of a country bank note, transfers it to D., without indorsing it, to pay for goods supplied by D. If the bank fails, C. is not liable for the price of the goods, unless he received notice of dishonour (*l*).

It seems from the last-cited cases (*l*) that the same strict and technical notice of dishonour is not requisite to charge a person liable on the consideration as is requisite to

(*g*) *Walton v. Mascal* (1844), 13 M. & W. 72; see *ibid.* at p. 452.

(*h*) *Carter v. White* (1883), 25 Ch. D. 666, C. A.

(*i*) See, e.g., *Brown v. Curtis* (1849), 2 New York R. 225; *contra*, *Foot v. Brown* (1841), 2 McClean, 369.

(*k*) *Smith v. Mercer* (1867), L. R. 3 Ex. 51; *contra*, *Swinyard v. Bowes* (1816), 5 M. & S. 62, not cited.

(*l*) *Camidge v. Allenby* (1827), 6 B. & C. 373; *Turner v. Stones* (1843), 1 D. & L. 122; *Robson v. Oliver* (1847), 10 Q. B. 704, cases on country bank notes; cf. sect. 58, *post*. When a man takes a country bank note as payment for a debt, it may perhaps be inferred on very slight evidence that he has taken it as absolute, and not as conditional, payment.

§ 50. — charge a party liable on the bill. This is fair, for in the one case the liability is transferable, in the other it is not, and therefore all defences between the parties can be inquired into. A distinction might be drawn between persons liable on the consideration who have, and who have not, been holders of the bill (*m*).

Noting inland bill.

51. (1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser (*n*).

By "noting" is meant the minute made by a notary public on a dishonoured bill at the time of its dishonour. The formal notarial certificate, or protest, attesting the dishonour of the bill is based upon the noting. See sect. 93, *post*.

The "noting" consists of the notary's initials, the date, the noting charges, and a mark referring to the notary's register written on the bill itself. The notarial registers bear certain letters upon them, and a corresponding letter is put upon the bill as a mark. A ticket or label is also attached to the bill on which is written the answer given to the notary's clerk who makes the notarial presentment, *e.g.*, "no orders," "no advice," "no effects," or "office closed." Before sending out the bill the notary makes a full copy of it in his register, and then subsequently adds the answer given, if any (*o*).

By sect. 73 this provision applies to cheques, and by sect. 89 to promissory notes. By sect. 57 the expenses of noting can be recovered as liquidated damages.

This Act attaches no legal consequences to noting an inland bill (*p*), except by making it a necessary pre-

(*m*) Cf. *Camidge v. Allenby* (1827), 6 B. & C. at p. 381.

(*n*) Cf. New York Negotiable Instruments Law, § 189.

(*o*) *Brooks' Notary*, 6th ed. p. 82. The fee in the City charged by London notaries is 1s. 6d., outside the City according to distance: *Ibid.* p. 407; and evidence before Select Committee on Bank Holidays Bill, 1868, see at pp. 51—53.

(*p*) Cf. *Chesmer v. Noyes* (1815), 4 Camp. 129 (noting or protest of bill in England no evidence of due presentment); cf. *Nye v.*

liminary to acceptance or payment for honour: see sects. 65 and 67. For business purposes noting is usually taken as showing due presentment. For purposes of summary diligence in Scotland an inland bill must be protested as heretofore: sect. 98, *post*, p. 331.

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(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged (*q*). Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary (*r*). Protest of foreign bill.

See "foreign bill," defined by sect. 4. By sect. 89 (4), *post*, protest of a foreign note is unnecessary for English purposes. As to protest for purposes of summary diligence in Scotland, see note to sect. 98, *post*. By sect. 52 (3), protest is not necessary in order to charge the acceptor of a bill.

The notice of dishonour is not bad because it omits to state that the bill has been protested (*s*), though it should state it. As to notice of protest under the foreign codes, see note to sect. 49 (12), *ante*.

The protest of a bill in England does not prove due presentment (*t*), *aliter* it seems when the bill is protested abroad, for there it is a judicial act (*u*).

Macdonald (1870), L. R. 3 P. C. 331, at p. 343 (notarial certificate of execution of deed).

(*q*) *Gale v. Walsh* (1793), 5 T. R. 239; cf. *Whitehead v. Walker* (1842), 9 M. & W. 506.

(*r*) Cf. New York Negotiable Instruments Law, § 260.

(*s*) *Ex parte Lowenthal* (1874), L. R. 9 Ch. 591, and see *ante*, p. 176.

(*t*) *Chesmer v. Noyes* (1815), 4 Camp. 129.

(*u*) *Brain v. Preece* (1843), 11 M. & W. at p. 775; cf. *Poole v. Dicus* (1835), 1 Bing. N. C. 649; *Daniel*, ed. 5, § 968.

§ 51.

For non-
payment
after non-
acceptance.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment (*x*).

Protest in such case might be necessary for the purpose of charging a foreign drawer or indorser in his own country. An English Act can only lay down the law for the United Kingdom, though by the comity of nations the duties of the holder would generally be regarded as regulated by the law of the place where they are to be performed. As has before been pointed out (*ante*, p. 161), under most of the continental codes no right of action arises on non-acceptance; the holder can demand security from antecedent parties, but he is bound to re-present the bill at maturity.

Time of
protest.

[7 & 8 Geo. 5,
c. 48.]

(4) Subject to the provisions of this Act (*y*), when a bill is noted or protested [it may be noted on the day of its dishonour, and must be noted not later than the next succeeding business day]. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (*z*).

For the provisions referred to, see sub-sect. (6) (a), and sub-sect. (9). The provisions of this sub-section as to the extension of the protest are supplemented by sect. 93, *post*.

By sect. 1 of the Bills of Exchange (Time of Noting) Act, 1917 (7 & 8 Geo. 5, c. 48), *post*, p. 414, the words in square brackets were substituted for the words "it must be noted on the day of its dishonour." The Act was passed to relieve notaries who were in difficulties owing to the depletion of their staff during the war; but the change was advocated before the war by the British delegates to the Hague Conferences on Negotiable Instruments. By

(*x*) New York Negotiable Instruments Law, § 265.

(*y*) See sub-sect. 9 of this section, *post*.

(*z*) New York Negotiable Instruments Law, § 263.

French Code, Art. 162, a bill is to be protested for non-payment on the day after it is due. By German Exchange Law, Art. 41, a dishonoured bill may be protested for non-payment on the day it is due, and it must not be protested later than the second day after. See the laws of different nations on the point collected: *Nouguier*, § 1270.

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(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers (*a*).

Protest for better security.

Under some of the continental codes, when the acceptor fails during the currency of a bill, security can be demanded from the drawer and indorsers (*b*). English law provides no such remedy, and the only effect of such a protest in England is that the bill may be accepted for honour. In France, if the acceptor fails, the bill may at once be treated as dishonoured and protested for non-payment (*c*). As to inhibition and arrestment in Scotland when the acceptor is *vergens ad inopiam*, see *Thorburn's Bills of Exchange Act*, p. 124.

(6) A bill must be protested at the place where it is dishonoured (*d*).

Place of protest.

Provided that—

(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if

(a) See *Brooks' Notary*, 6th ed. p. 86, and forms, p. 171; cf. New York Negotiable Instruments Law, § 266.

(b) See, e.g., German Exchange Law, Art. 29; Netherlands Code, Arts. 177, 178.

(c) French Code, Art. 163; *Nouguier*, § 1277.

(d) Cf. *Mitchell v. Baring* (1829), 10 B. & C. 4; French Code, Art. 173, and see sect. 94, *post*, as to protest in places where there is no notary available. Cf. New York Negotiable Instruments Law, § 264, which, however, omits proviso (a).

§ 51.

Place of
protest.

received during business hours, and if not received during business hours, then not later than the next business day.

This sub-section was inserted in committee to protect a common practice of the Liverpool notaries with regard to bills drawn on cotton-spinners in Lancashire.

- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

This sub-section reproduces the effect of the repealed 2 & 3 Will. 4, c. 98. Suppose a bill is drawn on B. in Liverpool, "payable at the X. Bank in London." It is dishonoured by non-acceptance. It is to be protested for non-payment in London without any further demand on B. Ordinarily the protest recites the demand on the acceptor or other person called on to pay.

Requisites
in form of
protest.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

- (a) The person at whose request the bill is protested:
(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found (*e*).

(*e*) Cf. New York Negotiable Instruments Law, § 261.

A protest ordinarily contains:—(1) An exact copy of the bill. (2) A statement of the parties for whom and against whom the bill is protested. (3) The date of protesting and the place where protest is made. (4) A statement that acceptance or payment was demanded by the notary; the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found. (5) A reservation of rights against the parties liable. (6) The subscription and seal of the notary making the protest (f). The protest must be stamped (see p. 405). A protest may be in duplicate or triplicate (g). Words requiring a protest to be under seal were struck out in committee.

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The protest must ordinarily be made by a notary public or other person authorized to act as such (h), but by sect. 94, *post*, when the services of a notary cannot be obtained at the place where the bill is dishonoured, protest may be made by any respectable inhabitant in the presence of two witnesses. By the Public Notaries Act (3 & 4 Will. 4, c. 70), solicitors in the country may be authorized by the Master of Faculties to practise as notaries. As to the exercise of notarial functions by British diplomatic and consular officers abroad, see 52 & 53 Vict. c. 10, s. 6, as amended by 54 & 55 Vict. c. 50. In England the notarial presentment of the bill to the drawee or acceptor is almost always made by the notary's clerk (i). In America the validity of a protest founded on such a presentment has been doubted (k).

Notaries.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold

Protest of lost bill or for non-delivery.

(f) See *Brooks' Notary*, 6th ed. p. 83; and for forms, see pp. 165—189; cf. French Code, Art. 173; German Exchange Law, Art. 88.

(g) *Brooks' Notary*, 6th ed. p. 83; *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105.

(h) Cf. German Exchange Law, Art. 87; French Code, Art. 173. As to the status and functions of a notary, see *Brooks' Office of a Notary*, 6th ed.; for forms, see *ibid.* pp. 165—189; and for fees in London, p. 401; and see Laws of England, tit. Notaries.

(i) *Brooks' Notary*, 6th ed. p. 106; and *Thomson*, p. 310, as to Scotland.

(k) See *Parsons on Bills*, p. 641; and cf. New York Negotiable Instruments Law, § 262, and notes in *Crawford's* edition.

§ 51. * it, protest may be made on a copy or written particulars thereof (*l*).

Excuses for non-protest or delay.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder; and not imputable to his default, misconduct, or negligence (*m*). When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence (*n*).

See sect. 50 as to excuses for non-notice and delay. Compare sect. 46 as to excuses for non-presentment and delay. See also sect. 16 (2), *ante*, as to indorsements waiving protest. Presumably this sub-section incorporates also sect. 48 (1), *ante*, which excuses non-notice in the case of a bill dishonoured by non-acceptance which subsequently comes into the hands of a holder in due course.

Duties of holder as regards drawee or acceptor.

52. (1) When a bill is accepted generally (*o*) presentment for payment is not necessary in order to render the acceptor liable (*p*).

The reason is that at common law the debtor, as a general rule, is bound to seek out his creditor to pay

(*l*) *Pothier*, No. 145; *Brooks' Notary*, 6th ed. p. 172. See further as to lost bills, sects. 69 and 70, *post*. The particulars can usually be obtained from the bill book. Cf. *New York Negotiable Instruments Law*, § 268.

(*m*) *Legge v. Thorpe* (1810), 12 East, 171; see, e.g., *Campbell v. Webster* (1845), 15 L. J. C. P. 4, waiver; *Rothschild v. Currie* (1841), 1 Q. B. at p. 47, delay.

(*n*) *New York Negotiable Instruments Law*, § 267.

(*o*) See sect. 19, *ante*, distinguishing general and qualified acceptances.

(*p*) *Rowe v. Young* (1820), 2 Bligh, H. L. at pp. 467, 468, per Bayley, J.; cf. *Maltby v. Murrells* (1860), 5 H. & N. at p. 823. See also the old form of declaration against an acceptor or maker in *Bullen and Leake's Precedents of Pleading*, ed. 3.

him (*q*). The practical importance of the rule is, that the acceptor cannot avail himself of any informality in the presentment. The holder would not be likely to bring an action without first applying for payment. If he did so, the Court presumably would make him pay the costs, and deprive him of interest (*r*). Serjeant Manning, in a note to a case he reports (*s*), suggests that if the holder (*i.e.*, the creditor) were out of England during the whole of the day on which the bill matured, it might be necessary to prove a demand before the acceptor could be sued. § 52.

By sect. 89 this enactment applies *mutatis mutandis* to the maker of a note.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures (*t*). Qualified acceptance.

The acceptor may, by the terms of a qualified acceptance, make presentment for payment a condition precedent to his liability (*u*). Thus, if a bill be accepted "Payable at the Union Bank only," the holder must present it for payment at that bank before he can sue the acceptor (*x*). When a bill is accepted payable at a particular place and there only, the acceptor's position is for many purposes analogous to that of the drawer of a

(*q*) *Cranley v. Hillary* (1813), 2 M. & S. 120; *Walton v. Muscull* (1844), 13 M. & W. at p. 458, promissory note; cf. *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. 31, at p. 37, distinguishing in this respect collateral from direct promises to pay.

(*r*) Cf. *Macintosh v. Haydon* (1826), Ry. & M. at p. 363, as to costs; *Pierce v. Fothergill* (1835), 2 Bing. N. C. 167, as to interest; and cf. sect. 57 (3), *post*; and see *Webster v. British Empire Ass. Co.* (1880), 15 Ch. D. 169, per Cotton, L.J.

(*s*) *Wilmot v. Williams* (1844), 7 M. & Gr. at p. 1018; cf. *Startup v. Macdonald* (1843), 6 M. & Gr. at p. 624.

(*t*) *Smith v. Vertue* (1860), 30 L. J. C. P. at p. 59, conditional acceptance; see per Keating, J., at p. 60, as to acceptance to pay at a particular place; and see *ante*, p. 51. Cf. New York Negotiable Instruments Law, § 130.

(*u*) Sect. 19, *ante*; and *Rowe v. Young* (1820), 2 Bligh, H. L. 391.

(*x*) *Halstead v. Skelton* (1843), 5 Q. B. at pp. 93, 94, Ex. Ch.

§ 52.

cheque (*y*). If, then, he could show that he was damnified by the holder's omission to present on the proper day, he would probably be discharged (*z*). Apart from such damnification he is liable until the Statute of Limitations applies (*a*).

By sect. 87 (1), when a note is in the body of it made payable at a particular place, presentment is required to charge the maker; and by sect. 89 (2), the provisions of this sub-section would apply to that case.

No notice
or protest
required.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

Thus, if B. in Liverpool accepts a bill payable at a bank in London, and it is presented there and dishonoured, no notice of dishonour need be given to B. (*b*). The same rule applies to the maker of a note (*c*).

Production
of bill.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it (*d*).

See "holder" defined by sect. 2, *ante*; and so to payment, see further sect. 59 (1), *post*. "The person who demands payment of a bill," says Platt, B., "must produce the bill, and offer to deliver it up on pay-

(*y*) *Bishop v. Chitty* (1742), 2 Stra. 1195; *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. at p. 70, per Parke, B.

(*z*) Cf. *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061, case of a cheque where bank failed; and New York Negotiable Instruments Law, § 130, and notes in *Crawford's* edition; *aliter*, if the acceptance be general, *Turner v. Hayden* (1825), 4 B. & C. 1.

(*a*) *Smith v. Vertue* (1860), 30 L. J. C. P. 56.

(*b*) *Treacher v. Hinton* (1821), 4 B. & Ald. 413; cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at p. 137.

(*c*) Sect. 89 (2), and *Pearse v. Pemberthy* (1812), 3 Camp. 261.

(*d*) New York Negotiable Instruments Law, § 134, to same effect.

ment" (e). "The acceptor paying the bill," says Lord Tenterden, "has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer" (f). When a bill is accepted payable at a bank, the practice is for the banker to return it to the acceptor the day after payment.

At common law an exception to the rule in this subsection was recognized in the case of a non-negotiable note (g).

As to the case of a lost bill or note, see note to sect. 70, *post*. Giving up the bill is a concurrent condition, and not a condition precedent to payment. The continental codes for the most part provide that the holder must take part-payment if it be offered. In that case he may retain the bill, but must indorse upon it the amount he has received. As to production for proof or dividend in bankruptcy, see *post*, p. 413.

The holder by producing the bill and demanding acceptance or payment does not warrant the authenticity of the instrument, or of the bill of lading, if any, attached thereto (h).

(e) *Ramuz v. Crowe* (1847), 1 Exch. 167, at p. 174.

(f) *Hansard v. Robinson* (1827), 7 B. & C. 90, at p. 94; *Crowe v. Clay* (1854), 9 Exch. 604, Ex. Ch.; German Exchange Law, Art. 39; cf. *Jones v. Broadhurst* (1850), 9 C. B. at p. 182; and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at p. 18, H. L., as to payment by drawer or indorser; and *Cornes v. Taylor* (1854), 10 Exch. 441; *Woodward v. Pell* (1868), L. R. 4 Q. B. 55, lien for costs.

(g) *Wain v. Bailey* (1839), 10 A. & E. 616; *Charnley v. Grundy* (1854), 14 C. B. at p. 614.

(h) *Guarantee Trust Co. of New York v. Hamay* (1918), 23 Com. Cas. 399, 402, C. A.; (1918) 2 K. B. 623, 631, C. A.

§ 53.

Funds in
hands of
drawee.

Liabilities of Parties.

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument (*i*). This subsection shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee (*k*).

ILLUSTRATIONS.

1. A., having 100*l.* at his bankers, draws a cheque on them for that sum in favour of C. The cheque is dishonoured. C. has no remedy against the bankers (*l*).

2. B. gives A. an open letter of credit authorizing him to draw to the extent of 10,000*l.*, and concluding "parties negotiating bills under it are requested to indorse particulars on the back hereof." A. accordingly draws a bill for 500*l.* in favour of C., who duly indorses the particulars on the credit. B. becomes insolvent, and dishonours the bill on presentment. C. can prove for 500*l.* against B.'s estate (*m*).

3. A. draws a bill on B. in favour of C., and remits funds to meet it. B. does not accept the bill, but he tells C. that he has

(*i*) New York Negotiable Instruments Law, § 211, and notes in *Crawford's* edition.

(*k*) *Thompson on Bills*, 2nd ed. p. 104; *Thorburn's Bills of Exchange Act*, p. 126; *Bell's Principles*, 9th ed. §§ 315 and 339.

(*l*) *Schroeder v. Central Bank* (1876), 34 L. T. N. S. 735.

(*m*) *Re Agra Bank* (1867), L. R. 2 Ch. 391; cf. *Ex parte Stephens* (1868), L. R. 3 Ch. at p. 756; *Union Bank of Canada v. Cole* (1877), 47 L. J. C. P. 100, C. A.; and *Citizens Bank v. New Orleans Bank* (1873), L. R. 6 H. L. 352.

received the funds and promises to pay the bill. B. does not pay the bill. No action on the bill can be maintained against B., but C. can sue B. for money received to his use (*n*). § 53.

4. A German bank, before war, draws a cheque on an English bank in favour of an English payee, and in consequence of war breaking out the cheque is refused payment. The payee cannot attach the funds of the German bank in the hands of the English bank (*o*).

According to English Law, the drawee of a bill, as such, incurs no liability to the holder, and there is no privity of contract between them (*p*); but privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement (*q*). In one instance, too, a *quasi*-privity has been created by sect. 74 (3), *post*, which provides that when the holder of a cheque omits to present it within a reasonable time, whereby the drawer has been damnified (*i.e.*, by the bank failing), the drawer is *pro tanto* discharged, and the holder is substituted as a creditor of the bank.

Not an assignment of funds in England.

In England, again, when a bill is accepted payable at a banker's, there is no privity between the drawer or holder and the acceptor's banker (*r*).

In Scotland the rule is otherwise; thus, where A. having 100*l.* at his bankers drew a cheque for 150*l.*, it was held that the cheque on presentation operated as an intimated assignation of the 100*l.* to his credit (*s*); so, too, where a bill is accepted payable at a banker's, it operates on presentment as an intimated assignation (*t*).

In France, as in Scotland, when the drawee has funds, drawing a bill operates as an assignment of them in favour

(*n*) *Griffin v. Weatherby* (1868), L. R. 3 Q. B. 753.

(*o*) *Re Bank- für Handel Industrie*, (1915) 1 Ch. D. 848.

(*p*) *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74, cheque; *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283, bill of exchange; *Carr v. Nat. Bank* (1871), 107 Massachus. R. 45; Netherlands Code, Art. 110; cf. *Vaughan v. Halliday* (1874), L. R. 9 Ch. 561.

(*q*) *Robey v. Ollier* (1872), L. R. 7 Ch. 695; *Ranken v. Alfaro* (1877), 5 Ch. D. 786.

(*r*) *Hill v. Royds* (1869), L. R. 8 Eq. 290; *Yates v. Bell* (1820), 3 B. & Ald. 643; *Moore v. Bushell* (1857), 27 L. J. Ex. 3. By § 147 of the New York Negotiable Instruments Law, "When the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

(*s*) *British Linen Co. v. Carruthers* (1883), 10 Sess. Cas. 923.

(*t*) *British Linen Co. v. Rainey* (1885), 12 Sess. Cas. 825.

§ 53.

Letter of
credit.

of the holder, and creates a privity between holder and drawee (*u*).

Letters of Credit.—A letter of credit, says Story, is “a letter of request whereby one person (usually a merchant or banker) requests some other person to advance moneys or give credit to a third person named therein for a certain amount, and promises that he will repay such sum to the person advancing the same or accepts bills drawn upon himself for the like amount. It is called a general (or open) letter of credit when it is addressed to all merchants or other persons in general; and it is called a special letter of credit when it is addressed to a particular person by name, requesting him to make such advance to a third person” (*x*).

See the nature of a letter of credit commented on by Lord Cairns in a case where it was held that a writing opening a credit for a particular sum does not of itself constitute an equitable assignment or specific appropriation of that sum so as to create a trust. It is an undertaking that the person giving it will act as paymaster to the person to whom it is given, up to a certain amount, on his performing the conditions set forth in it. It is usually operated on by bills of exchange, but it may be operated on by cheques or simple demand of payment (*y*). As to open letters of credit, see Illustration 2; and see an open letter of credit distinguished from an ordinary or special credit by Brett, L.J. (*z*). By sect. 32 of the Stamp Act, 1891, *post*, p. 397, a credit to be used in the United Kingdom requires a stamp.

A letter of credit is not a negotiable instrument, and the production of it does not authorize payment of drafts under it to the person presenting it if, as a fact, those drafts are forged (*a*). So, too, where a letter of credit in favour of C. was stolen, and the thief having indorsed C.'s name on it, represented that he was authorized by C.

(*u*) *Bravard-Demangeat*, 7th ed. p. 235; *Nouguier*, §§ 392—431.

(*x*) *Story*, §§ 459 *et seq.* See the American cases on credits analysed in *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. 107, at p. 112, n.

(*y*) *Morgan v. Larivière* (1875), L. R. 7 H. L. at p. 432. And see note to *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. at p. 109.

(*z*) *Union Bank of Canada v. Cole* (1877), 47 L. J. C. P. at p. 109.

(*a*) *Orr v. Union Bank* (1854), 4 Macq. H. L. 513, see at p. 523.

to receive the amount, it was held that payment to him did not discharge the paying bank (*b*).

§ 53.

London is the great accepting centre of the world, and much foreign trade, some of which never comes near England, is financed by bills on London. These bills and others are drawn under various forms of credits framed to meet the exigencies of commerce. For example, besides the familiar traveller's credits, there are confirmed and unconfirmed credits (*c*), clean credits and documentary credits, rolling credits, and the London acceptance credit (*d*). An unconfirmed credit may be described as a mere authority to draw bills in accordance with the terms of the credit, while a confirmed credit contains a binding promise to honour bills so drawn.

Drawee and Drawer.—Subject to the rule that a customer is entitled to draw cheques on his banker (*post*, p. 291), a creditor, as such, is not entitled to draw on his debtor in respect of his debt; and the drawee of an unaccepted bill of exchange is under no obligation to accept or pay it unless he has for valuable consideration expressly or impliedly agreed to do so (*e*).

Relations of
drawer and
drawee.

In some continental countries the duty to accept or pay bills arises from the mere relationship of debtor and creditor in a mercantile transaction (*f*); whereas here there must be an agreement founded on consideration. Apart from something special in the contract, it seems that the authority or obligation to accept is not revoked by the death of the drawer (*g*), while it is by notice of his bank-

(*b*) *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. 107.

(*c*) As to an unconfirmed credit, see *Société Coloniale v. London & Brazilian Bank* (1911), 17 Com. Cas. 1, C. A.; *Panoutsos v. Raymond Hadley*, (1917) 2 K. B. 473, C. A. (unconfirmed credit when confirmed credit promised); *Jordeson & Co. v. London Hardwood Co.* (1913), 19 Com. Cas. 161, 173.

(*d*) See *Spalding's Foreign Exchange and Foreign Bills*, Chap. XV.

(*e*) *Chitty*, p. 200; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 351, Ex. Ch.; *Re Boyse* (1886), 33 Ch. D. 609, at p. 624; see e.g., *Smith v. Brown* (1815), 6 Taunt. at p. 344; *Laing v. Barclay* (1823), 1 B. & C. 398; *Huntley v. Sanderson* (1833), 1 Cr. & M. 467 (agent authorised to draw on principal; contract of indemnity); *Cumming v. Shand* (1860), 29 L. J. Ex. at p. 132 (implied agreement to let customer overdraw); *English Credit Co. v. Arduin* (1871), L. R. 5 H. L. 64 (construction of credit).

(*f*) *Pothier*, No. 92; *Nouguier*, § 442; *Belgian Code de Commerce*, Art. 8.

(*g*) *Chitty*, p. 202; *Story*, § 250; *Cutts v. Perkins* (1815), 12

§ 53. ruptcy; for this renders funds in the hands of the drawee no longer available for the payment of the bill, and incapacitates the drawer from fulfilling his part of the contract (*h*). The bankruptcy of the drawee is not *per se* a breach of contract with the drawer (*i*). In France the engagement between drawer and drawee is held to be a contract of "mandat," and their relations are regulated accordingly (*k*).

Advice. *Letter of Advice.*—It is usual, but not necessary, for the drawer to advise the drawee of drafts drawn on him by letter of advice (*l*). If a bill is drawn "as per advice," then the drawee is not bound to accept or pay without such advice, and if he does it is at his own peril. (See *Story on Bills*, § 68.)

Damages. When the drawee breaks his contract with the drawer by dishonouring his draft, the consequences reasonably resulting from the breach of contract constitute the measure of damage (*m*). Thus:—

1. A customer having a balance of 200*l.* at his banker's draws a cheque for 100*l.*, or accepts a bill for 100*l.* payable at his banker's. If this cheque or bill is dishonoured he may recover substantial damages for the injury to his credit, without proving any actual loss (*n*).

2. A., in a foreign country, draws on B., in England, under a letter of credit. B. dishonours his draft. A. may recover the re-exchange and notarial expenses which he has had to pay to the holder (*o*), and also the cost of telegrams, &c. consequent on the dishonour (*p*).

Massachus. R. 206; cf. *Billing v. Devaux* (1841), 3 M. & Gr. at p. 574; *Att.-Gen. v. Pratt* (1874), L. R. 9 Ex. 140.

(*h*) *Pothier*, No. 96; cf. *Citizens Bank v. New Orleans Bank* (1873), L. R. 6 H. L. 352.

(*i*) *Ex parte Tondeur* (1867), L. R. 5 Eq. 160; cf. *Ex parte Agra Bank* (1870), L. R. 9 Eq. at p. 733.

(*k*) *Pothier*, Nos. 91—100; *Bravard-Demangeat*, 7th ed. p. 219; *Code Civil*, Arts. 1984—2010.

(*l*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. at p. 586; *Nouguier*, §§ 281—284; *Pothier*, No. 36.

(*m*) *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92; cf. *Isley v. Jones* (1858), 78 Massachus. R. 260 (accommodation bill).

(*n*) *Rolin v. Steward* (1854), 23 L. J. C. P. 148; cf. *Cumming v. Shand* (1860), 59 L. J. Ex. 129; *Summers v. City Bank* (1874), L. R. 9 C. P. 580; *Boyd v. Fitt* (1863), 14 Ir. C. L. R. 43.

(*o*) *Walker v. Hamilton* (1860), 1 De G. F. & J. 602; *Re General South American Co.* (1877), 7 Ch. D. 637.

(*p*) *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92; *Larios v. Bonany* (1873), L. R. 5 P. C. 346, 357.

Although possibly an acceptor, as such, may not be liable for re-exchange, it is clear that the drawee by accepting cannot alter or escape from his special contract with the drawer; and this might perhaps be alleged as the ground of his liability for re-exchange, &c. when sued by the drawer (*q*), but the probability is, that the cases in which it was held that an acceptor was not liable for re-exchange are simply overruled (*r*). As to paying a draft contrary to instructions, see *Twibell v. London Suburban Bank* (*s*). § 53.

54. The acceptor of a bill, by accepting it— Liability of acceptor.
 (1) Engages that he will pay it according to the tenor of his acceptance (*t*);

See sect. 19, *ante*, as to general and qualified acceptances, and sect. 52, *ante*, as to presentment to charge acceptor. As to variation of the acceptor's liability by *ex post facto* legislation, e.g., a French "loi moratoire," see note to sect. 72 (5), *post* (conflict of laws). As to measure of damages, see sect. 57, *post*. The drawee of a bill, by accepting it, becomes the party primarily liable thereon to the holder (*u*). See the primary, and, in general, absolute, liability of an acceptor distinguished from the secondary and conditional liability of a drawer or indorser by Bayley, J. (*x*). As to the relations *inter se* of joint acceptors who are not partners, see per Wilde, C.J. (*y*).

In the case of a bill accepted for value the acceptor is frequently described as the principal debtor, and the drawer and indorsers as his sureties (*z*); but, as Lord

(*q*) Cf. sect. 57 (2), *post*.

(*r*) Cf. *Ex parte Roberts* (1886), 18 Q. B. D. 286, C. A.

(*s*) *Twibell v. London Suburban Bank* (1869), W. N. p. 127; *Paget on Banking*, ed. 2, p. 112; *London & S. W. Bank v. Buszard* (1919), 35 T. L. R. 142.

(*t*) *Smith v. Vertue* (1860), 30 L. J. C. P. 56, at p. 60; cf. *Walton v. Mascall* (1844), 13 M. & W. at p. 458; French Code, Art. 121; German Exchange Law, Art. 23; New York Negotiable Instruments Law, § 112.

(*u*) *Philpot v. Briant* (1828), 4 Bing. at p. 720.

(*x*) *Rowe v. Young* (1820), 2 Bligh, H. L. at p. 467; *Jones v. Broadhurst* (1850), 9 C. B. at p. 181, per Cresswell, J.

(*y*) *Harmer v. Steele* (1849), 4 Exch. at p. 13.

(*z*) See, e.g., *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, per Willes, J.; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. at p. 536, per Cockburn, C.J.

§ 54.

Blackburn has pointed out, this is not an accurate expression. The drawer or indorser "is not exactly a surety for the acceptor, or co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety" to entitle him to the equities of a surety when the bill has been dishonoured, though not before (a).

Tender
post diem.

A plea, by the acceptor, of tender after maturity is bad (b).

Estoppels
binding
acceptor.

(2) Is precluded from denying to a holder in due course :

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill (c) ;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse (d), but not the genuineness (e) or validity (f) of his indorsement ;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to

(a) *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1 H. L. at p. 19.

(b) *Poole v. Tumblebridge* (1837), 2 M. & W. 223; *Dobie v. Larkan* (1855), 10 Exch. 776; cf. *Leake on Contracts*, ed. 3, p. 861.

(c) *Cooper v. Meyer* (1830), 10 B. & C. 468; *Sanderson v. Collman* (1842), 4 M. & Gr. 209; *National Park Bank v. Ninth Bank* (1871), 46 New York R. 77; New York Negotiable Instruments Law, § 112.

(d) *Braithwaite v. Gardiner* (1846), 8 Q. B. 473 (bankrupt); *Smith v. Marsack* (1848), 18 L. J. C. P. 65 (married woman before the Act of 1882); *Hallifax v. Lyle* (1849), 3 Exch. 446 (corporation having no power to issue bills).

(e) *Beeman v. Duck* (1843), 11 M. & W. 251; cf. *Smith v. Chester* (1787), 1 T. R. 654.

(f) *Robinson v. Yarrow* (1817), 7 Taunt. 455 (bill drawn and indorsed "per proc." without authority); *Garland v. Jacomb* (1873), L. R. 8 Ex. 216, Ex. Ch. (bill drawn and indorsed by partner in non-trading firm without authority of co-partner).

indorse (*g*), but not the genuineness or validity of his indorsement. § 54.

This section deals only with estoppels arising on the bill. There may, of course, be other estoppels arising on evidence: see sect. 24 and notes thereto, *ante*. If the amount of the bill be altered, or if any other material alteration be made in it, the acceptor is not precluded by this section from setting it up (*h*).

The distinction between capacity and authority (*ante*, p. 68) reconciles the cases, which otherwise appear to be in conflict. It is clear that capacity to draw must be identical with capacity to indorse, this being a question of *status*; while an authority to draw on behalf of another does not necessarily include an authority to indorse on his behalf (*i*).

Where the drawer of a bill payable to drawer's order was a fictitious person, it was said in some of the cases that the acceptor undertook to pay to an indorsement in the same handwriting as the drawer's signature (*k*); but, in other cases, it was said that the bill might be treated as payable to bearer (*l*). Sect. 7 (3) of the Act, *ante*, has adopted the latter view.

The acceptor may, of course, decline to pay on the ground that the payee's signature has been forged (*m*). If, however, the payee be a fictitious person, the holder is entitled to treat the bill as if drawn payable to bearer. See sect. 7 (3), *ante*.

(*g*) *Daniel*, § 536; cf. *Drayton v. Dale* (1823), 2 B. & C. 293, at p. 299; New York Negotiable Instruments Law, § 112.

(*h*) *White v. Central National Bank* (1876), 64 New York R. 316; cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; and sect. 64, *post*, as to alterations.

(*i*) Cf. *Prescott v. Flinn* (1832), 9 Bing. at p. 22; Indian Code, § 27.

(*k*) *Cooper v. Meyer* (1830), 10 B. & C. 468; *London & S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96.

(*l*) *Beeman v. Duck* (1843), 11 M. & W. at p. 256; cf. *Phillips v. im Thurn* (1866), L. R. 1 C. P. at p. 471.

(*m*) See sect. 24 and notes thereto, *ante*; and cf. *Robarts v. Tucker* (1851), 16 Q. B. 560.

§ 55.

Liability of
drawer.

Estoppels
binding
drawer.

55. (1) The drawer of a bill by drawing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, providing that the requisite proceedings on dishonour be duly taken (*n*);
- (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (*o*).

As to “dishonour,” see sects. 43 and 47, *ante*. As to express stipulations in the bill restricting the ordinary liability of the drawer, or releasing the holder from the performance of his ordinary duties, see sect. 16, *ante*. As to measure of damages, see sect. 57, *post*.

The drawer and indorsers of a bill are jointly and severally responsible to the holder for the due acceptance and payment thereof (*p*). If it be dishonoured the holder may enforce payment from the drawer, or an indorser, or the acceptor, or all or any of them at his option. The liability of the drawer of an accepted bill must in general be measured by that of the acceptor, their relations for

(*n*) See per Lord Lyndhurst in *Siggers v. Lewis* (1834), 1 C. M. & R. at p. 371 (cause of action); per Parke, B., in *Whitehead v. Walker* (1842), 9 M. & W. 506, at p. 516 (dishonour by non-acceptance); per Lord Kingsdown in *Allen v. Kemble* (1848), 6 Moore, P. C. at p. 321 (set-off or *compensatio* according to foreign law); per Cresswell, J., in *Jones v. Broadhurst* (1850), 9 C. B. at p. 181 (payment by drawer); per Alderson, B., in *Gibbs v. Fremont* (1853), 9 Exch. at p. 30 (measure of damages); and see note to sect. 54 (1); per North, J., in *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at pp. 525, 526 (measure of damages when bill dishonoured abroad).

(*o*) *Collis v. Emett* (1790), 1 H. Bl. 313; cf. *Phillips v. im Thurn* (1865), 18 C. B. N. S. 694, at p. 701; *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A., per Bowen, L.J.; cf. New York Negotiable Instruments Law, § 111.

(*p*) *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525, at p. 537; German Exchange Law, Arts. 8 and 49; Netherlands Code, Art. 146. By Art. 118 of the French Code the drawer and indorsers are “garants solidaires” for the acceptance and payment of the bill.

most, not all, purposes resembling those of principal and surety (*q*). See note to sect. 54 (1), *ante*. § 55.

- (2) The indorser of a bill, by indorsing it— Liability of indorser.
- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (*r*);
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements (*s*); Estoppels binding indorser.
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto (*t*).

The indorser of a bill is in the nature of a new drawer (*u*), that is to say, his relations with the holder resemble those of a drawer. "Ce contrat," says Pothier, No. 79, "est entièrement semblable à celui qui intervient

(*q*) *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525, at pp. 536, 537.

(*r*) *Suse v. Pompe* (1860), 30 L. J. C. P. at p. 78, per Byles, J.; cf. *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, at p. 18, per Lord Blackburn; German Exchange Law, Art. 18; cf. New York Negotiable Instruments Law, § 116.

(*s*) *Ex parte Clarke* (1792), 3 Brown, C. C. 238; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425; *McGregor v. Rhodes* (1856), 6 E. & B. 266.

(*t*) Cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261, as modified by sect. 64; and New York Negotiable Instruments Law, § 116.

(*u*) *Penny v. Innes* (1834), 1 C. M. & R. at p. 441, per Parke, B.; *Steele v. M'Kinlay* (1880), 5 App. Cas. at pp. 767, 768, per Lord Blackburn; cf. *Burmester v. Hogarth* (1843), 11 M. & W. 97.

§ 55.

entre le tireur et le donneur de valeur.” It is conceived that the words “according to its tenor” mean the tenor of the bill at the time of its indorsement, and not its tenor at the time it was drawn, if its effect has been varied, *e.g.*, by a qualified acceptance, or by an alteration of the sum payable; see sub-sect. (b) (x). As to measure of damages, see sect. 57, *post*. By sect. 89 (2), where the payee of a promissory note indorses it, his liability resembles that of the drawer of an accepted bill payable to drawer’s order.

If the holder sue an indorser it is no defence to show that the drawer’s or acceptor’s signature has been forged, or that the amount of the bill was altered after issue and before indorsement, unless such alteration avoids the bill under the stamp laws.

Stranger
signing bill
liable as
indorser.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course (y).

ILLUSTRATIONS.

1. The holder of a bill already indorsed in blank, and therefore negotiable by mere delivery, indorses it, and passes it away. He thereby incurs the liabilities of an indorser (z).

2. A note is made payable to C. or order. After issue D. adds his signature thereto, to accommodate and guarantee the maker. D. is not liable as a new maker (a), but he is liable as an indorser, even if he write his name on the face of the note (b).

3. The payee of a *non-negotiable* note indorses it to D., who indorses it to the plaintiff. The plaintiff, it seems, cannot recover from D. as an indorser, for the stamp is exhausted (c).

(x) Compare, however, the dictum of Lush, J., in *Lebel v. Tucker* (1867), L. R. 3 Q. B. at p. 81, with the dictum of Alderson, B., in *Gibbs v. Fremont* (1853), 9 Exch. at p. 31.

(y) *Steele v. M’Kinlay* (1880), 5 App. Cas. at pp. 772, 782. It is clear that an indorsement by way of receipt does not come within this rule. Cf. *Keane v. Beard* (1860), 8 C. B. N. S. at p. 382, per Byles, J., and sect. 59, *post*; New York Negotiable Instruments Law, §§ 113—115, modify and elaborate the provisions of this section.

(z) Cf. *Fairclough v. Pavia* (1854), 9 Exch. at p. 695.

(a) *Gwinnell v. Herbert* (1836), 6 N. & M. 723.

(b) *Ex parte Yates* (1858), 2 De G. & J. 191, L.JJ. *Qu.* if he be liable to the payee, or only to subsequent parties? See *Steele v. M’Kinlay*, *ubi supra*.

(c) *Plimley v. Westley* (1835), 2 Bing. N. C. 249; but he can sue on the consideration, although he has not given notice of dishonour.

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4. The drawer of a bill indorses it specially to the plaintiff. C. afterwards backs it with his signature to guarantee the drawer, and then the plaintiff adds his indorsement. The plaintiff can recover from C. as an indorser (*d*).

5. A bill is drawn payable to drawer's order and accepted. C. afterwards backs it with his signature. C. is liable as indorser to subsequent parties, but parol evidence is not admissible to show that C. intended to be liable to the drawer in case the bill was dishonoured. Such an agreement must be in writing to satisfy the Statute of Frauds (*e*).

6. The drawer of a bill indorses it to C., who has undertaken to be answerable for the price of goods supplied to the acceptor. C. then indorses the bill back to the drawer. The drawer, in his character of indorsee, can sue C. as indorser (*f*).

7. A. draws a bill on B., payable to his own order. B. accepts the bill, and gets C., his father, to write his name on the back of the bill in order to guarantee it. At the time when C. wrote his name, the bill had not been indorsed by the drawer. The drawer cannot sue C., the indorser (*g*).

8. C. undertakes to guarantee a debt due from B. to A. B. signs a blank acceptance, and C. adds his signature as indorser. The document is handed to A., who fills it up as a bill payable to drawer's order, inserting his own name as drawer. C., though an indorser, is liable to A., the drawer, on this bill (*h*).

As to the liability of an indorser, see sect. 55 (2), *ante*. As to his power to vary his liability by express stipulation, see sect. 16, *ante*, which may perhaps be regarded as incorporated.

An indorsement, properly so called, must be made by the holder; but when a person who is not the holder of a bill or note backs it with his signature, he is not an indorser, but a *quasi*-indorser. The law annexes to his act consequences similar to those which follow the indorsement of a bill by the holder. Formerly, when a stranger

(*d*) *Penny v. Innes* (1834), 1 C. M. & R. 439; cf. *Young v. Glover* (1857), 3 Jur. N. S. 637, Q. B.

(*e*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754, H. L.; overruling, it seems, *Matthews v. Bloxsome* (1864), 33 L. J. Q. B. 209.

(*f*) *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636, C. A.; distinguishing *Steele v. M'Kinlay*, *supra*. Cf. sect. 37, *ante*.

(*g*) *Jenkins & Sons v. Coomber*, (1898) Q. B. 168; followed and approved, *Shaw & Co. v. Holland and Neal*, (1913) 2 K. B. 15, C. A.

(*h*) *Glenie v. Bruce Smith*, (1908) 1 K. B. 263, C. A. If the bill had been drawn payable to bearer no question could have arisen. *Ibid.* at p. 269; but see § 114 of the New York Negotiable Instruments Law, and cases cited in *Crawford's* edition; and *Shaw & Co. v. Holland and Neal*, (1913) 2 K. B. 15, C. A., where it is pointed out that the *Glenie Case* turned on sect. 20 (authority to fill up incomplete bill).

§ 56. to the bill backed it with his signature, a pleading difficulty arose, as to whether he was to be described as an indorser or as a new drawer. The difficulty was, it is submitted, simply technical, for the consequences are identical. Now, it would be sufficient to state the facts or describe him as an indorser. By § 113 of the New York Negotiable Instruments Law, "a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity." This, too, is English law, *e.g.*, if a person writes a guarantee on a bill he is liable as a guarantor (*i*). By § 114 of the New York Law, "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as an indorser in accordance with the following rules: (1) if the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

It is to be noted that if two or more persons indorse a bill or note, to accommodate the acceptor or maker, their relations *inter se* are those of co-sureties, and not of sureties in succession according to the order of their names on the bill (*k*).

Qu. as to the power of the Court to rectify a bill where the parties' names have been transposed by mistake? (*l*).

Aval.

Avals.—Such an indorsement as is referred to by this section would in continental countries be termed an "aval," which is said by Lord Blackburn to be an antiquated term signifying "underwriting" (*m*). According to Pothier (*n*), an "aval" might be either on the bill itself or on a separate paper, and if such an "aval" was given by anyone, his obligation to all subsequent holders

(*i*) *Stagg and Mantle v. Brodrick* (1895), 12 T. L. R. 12.

(*k*) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P. C.

(*l*) See *Matthews v. Bloxsome* (1864), 33 L. J. Q. B. 209, as commented on in *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 774; *Druiff v. Parker* (1868), L. R. 5 Eq. 131; cf. Illustration 8, *ante*, p. 215.

(*m*). *Steele v. M'Kinlay* (1880), 5 App. Cas. at p. 772.

(*n*) As cited by Lord Blackburn, *ubi supra*.

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of the bill was precisely the same as that of the person to facilitate whose transfer the aval was given, and under whose signature it was written. English and Scotch law, as Lord Blackburn proceeds to point out, do not go so far as this. If a person not the holder indorse a bill, he is not a surety for the drawee or acceptor to the drawer; "such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason and because the original bill has incident to it the capacity of an indorsement in the nature of an 'aval,' that such an indorsement requires *no new stamp*" (o).

Nouguier, dealing with modern French law, defines an "aval" as "une convention au moyen de laquelle un tiers, étranger à la lettre de change, se rend caution solidaire du paiement à l'échéance en faveur du tireur, de l'un des endosseurs ou de l'accepteur. Cet acte a reçu le nom d'*aval* parce qu'il signifie *faire valoir*" (p).

If a person undertakes, for a commission, to indorse the bills of another person, the holder should apply for the indorsement within a reasonable time (q).

57. Where a bill is dishonoured (r), the measure of damages, which shall be deemed to be liquidated damages (s), shall be as follows:

Measure of damages against parties to dishonoured bill.

(1) The holder may recover from any party

(o) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754; see also at p. 782, per Lord Watson, and his comments thereon in *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, at p. 748.

(p) *Nouguier*, §§ 821—840; French Code, Arts. 141, 142. See also Spanish Code, Arts. 475—478; Netherlands Code, Arts. 130—132; Italian Code, Arts. 274—276, which regulate avals for their different countries.

(q) *Payne v. Ives* (1823), 3 D. & R. 664; discussed *Goring v. Edmonds* (1829), 6 Bing. 94, at p. 99.

(r) See sect. 43, dishonour by non-acceptance; sect. 47, dishonour by non-payment.

(s) This enables the damages given by this section to be recovered under Order XIV. See *London and Universal Bank v. Clancarty*, (1892) 1 Q. B. 689, "interest till payment or judgment"; *Lawrence v. Wilcocks*, (1892) 1 Q. B. 696, C. A., noting and interest till payment; *Dando v. Boden*, (1893) 1 Q. B. 318, notarial charges described in the writ as "bank charges." At common law the expenses of noting an inland bill could only be recovered as special damages (*Rogers v. Hunt* (1854), 10 Exch. 473); see further the notes to Order III. rule 6, in the Annual Practice.

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liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

- (a) The amount of the bill:
- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand (*t*), and from the maturity of the bill in any other case (*u*):
- (c) The expenses of noting, or, when protest is necessary (*x*), and the protest has been extended, the expenses of protest.

ILLUSTRATIONS.

1. Bill drawn in Tobago on London and accepted. The acceptor fails. The bill is remitted to Tobago and paid by the drawer. The drawer can recover the re-exchange from the acceptor as unliquidated damages (*y*).

2. A bill is drawn in Australia by a bank there on its English branch, and is dishonoured in England. The holder can only claim interest at the English, and not the Australian, rate (*z*).

3. Bill drawn in Rio on England. The acceptor fails. The bill is protested for better security, and is then accepted and paid for the honour of the drawer by an English bank. The bank can only recover from the acceptor the damages given by the sub-section, and not the expenses of protest for better security or commission for accepting for honour (*a*).

4. Bill drawn in Switzerland on London. It is accepted and dishonoured by non-payment. The holder can recover the damages mentioned in sub-sect. (1), but is not entitled to recover commission, brokerage (courtage), stamps, or postage (*b*).

(*t*) *Re East of England Banking Co.* (1868), L. R. 4 Ch. 14.

(*u*) *Lithgow v. Lyon* (1805), Coop. Ch. Ca. 29; *Laing v. Stone* (1828), 2 M. & Ry. 562.

(*x*) Foreign bill, not note. See sect. 51 (2), *ante*.

(*y*) *Ex parte Roberts* (1886), 16 Q. B. D. 702, affirmed 18 Q. B. D. 286, C. A.; see note, *post*, and *Dicey's Conflict of Laws*.

(*z*) *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

(*a*) *Ex parte Bank of Brazil, Re English Bank of the River Plate*, (1893) 2 Ch. 438.

(*b*) *Banque Populaire de Bienne v. Cave* (1895), 1 Com. Cas. 67,

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As to interest proper, reserved by the bill itself, see sect. 9 (3), *ante*. Sect. 57 (1) must be read subject to sub-sect. (3), *post*, which gives the Court a control over interest. The bill must be produced at the trial to entitle the plaintiff to interest before writ (*c*). In one case it was said that interest could only be recovered from the drawer or indorser from the time when he received notice of dishonour (*d*). But that case must be regarded either as no longer law, or as a case where interest was under the special circumstances disallowed by the jury, as provided for by sub-sect. (3). Since the Act it seems that when a bill is dishonoured by non-acceptance, interest can only be recovered from the date of its maturity, and not from the date of its dishonour. This seems fair in principle, but perhaps does not accord with the practice before the Act (*e*). By French Code, Art. 184, and Netherlands Code, Art. 195, interest accrues from the day of protest for non-payment. By German Exchange Law, Art. 50, interest accrues from the day of maturity. Interest in England is usually calculated and allowed at the rate of 5 per cent. (*f*).

The sub-section though general in terms appears to apply only to bills dishonoured at home (*g*).

The sub-section, moreover, is not exhaustive. It does not apply to the case of a foreign drawer or indorser who may be liable for re-exchange, when resorted to in his own country. But sect. 97, *post*, saves the law merchant when not inconsistent with the Act. This makes good the *casus omissus*; therefore, when a foreign drawer has paid re-exchange, he may recover it from the English acceptor, and if he is liable for re-exchange, he may prove for it in bankruptcy against the acceptor's estate before actual payment (*h*).

per Mathew, J., in cases where sub-sect. (1) applies the damages awarded by it are exhaustive.

(*c*) *Hutton v. Ward* (1850), 15 Q. B. 26.

(*d*) *Walker v. Barnes* (1813), 5 Taunt. 240.

(*e*) *Harrison v. Dickson* (1811), 3 Camp. 52, n.; cf. *Suse v. Pompe* (1860), 8 C. B. N. S. at p. 566.

(*f*) *Mayne on Damages*, ed. 8, p. 195.

(*g*) *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

(*h*) *Ex parte Robarts, Re Gillespie* (1885), 16 Q. B. D. 702; affirmed, with reduction of amount, 18 Q. B. D. 286, C. A. According to the judgment of Cave, J., the object of the section is to fix the amount which may be inserted in a specially-indorsed writ as liquidated damages, and not to deprive any party of special damages. But

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Re-exchange.

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him the amount of the re-exchange with interest thereon until the time of payment (*i*).

Bills dishonoured abroad fall exclusively under this sub-section. The holder cannot at his option claim under sub-sect. (1) (*k*).

It was formerly held that an English acceptor was not liable for re-exchange (*l*); but this rule, it appears, is no longer law (*m*). "Re-exchange," in its usual application, means the loss resulting from the dishonour of a bill in a country different to that in which it was drawn or indorsed (*n*). The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the *then rate of exchange* on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour (*o*). The expenses

see *contrà*, per Mathew, J., in *Banque Populaire de Bienne v. Cave* (1895), 1 Com. Cas. 67, 69.

(*i*) Cf. *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at p. 538; *Daniel*, §§ 1444—1452; see the theory of re-exchange explained by Sup. Court of U. S. in *Bank of United States v. United States* (1844), 2 Howard, at p. 737.

(*k*) *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522.

(*l*) *Napier v. Schneider* (1810), 12 East, 420; *Woolsey v. Crawford* (1810), 2 Camp. 445; *Dawson v. Morgan* (1829), 9 B. & C. at p. 620.

(*m*) *Ex parte Robarts* (1886), 16 Q. B. D. 702; affirmed 18 Q. B. D. 286, C. A.; *Re General South American Co.* (1877), 7 Ch. D. 637; *Pothier*, No. 117; *Story*, § 398; unless the cases be explained as resting on the special contract between drawer and drawee. This might reconcile the decisions, but does not appear to be the ground of decision.

(*n*) Cf. *Willans v. Ayers* (1877), 3 App. Cas. at p. 146, P. C.; and see *Mellish v. Simcon* (1794), 2 H. Bl. 378 (cumulative re-exchange against drawer); *Suse v. Pompe* (1860), 8 C. B. N. S. 538, see at pp. 566, 567; French Code, Arts. 177—186.

(*o*) *De Tastet v. Baring* (1809), 11 East, at p. 269; *Suse v. Pompe* (1860), 8 C. B. N. S. at pp. 566, 567; German Exchange Law, Art. 50.

consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the price of the stamp (*p*). § 57.

The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a "re-draft." The indorser who pays a re-draft may in like manner draw upon the antecedent party (*q*). For example:—A., in England, draws a bill for 100*l.* on B. in Calcutta, payable there at a rate of exchange indorsed thereon. This entitles the holder to receive (say) Rupees 1000. The bill is dishonoured, and the expenses of protest, &c. come to Rs. 10. The holder is then entitled to Rs. 1010 in Calcutta. At the time of dishonour sight bills on England are at 5 p. c. discount. Accordingly a sight bill on England for 106*l.* 1*s.*, would realize in Calcutta Rs. 1010. The holder may either draw a sight bill on A. for 106*l.* 1*s.*, and thus recoup himself, or he may sue A. in England for 105*l.* and interest, and 1*l.* 1*s.* expenses.

A custom according to which the holder may recover either the sum he gave for the bill or the re-exchange, at his option, is invalid (*r*); but a custom according to which a fixed rate of damages is substituted for re-exchange is probably valid (*s*). In some countries a fixed rate is provided for by statute (*t*).

The term "re-exchange" is used to signify (1) the amount of a re-draft, (2) the loss on a particular transaction occasioned by the exchange being adverse, (3) the course of exchange itself, or (4) the right to the sum which would be secured by a re-draft; so the context must always be looked to. When English law governs, the right to re-exchange arises on dishonour by non-acceptance, as well as on non-payment (*u*). Under most continental codes it only arises on dishonour by non-

(*p*) *Re Commercial Bank of South Australia* (1887), 36 Ch. D. at p. 528.

(*q*) Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe* (1860), 8 C. B. N. S. at p. 565; French Code, Art. 178; German Exchange Law, Art. 53.

(*r*) *Suse v. Pompe* (1860), 8 C. B. N. S. 538.

(*s*) *Willans v. Ayers* (1877), 3 App. Cas. at p. 144, P. C.

(*t*) Tobago, for example. See *Ex parte Roberts* (1886), 18 Q. B. D. 286, C. A.

(*u*) Cf. *Suse v. Pompe* (1860), 8 C. B. N. S. at p. 566.

§ 57. payment. For the reason, see *ante*, p. 161. See the subject of re-exchange carefully worked out, German Exchange Law, Arts. 49—54; French Code, Arts. 177—186; *Nouguier*, §§ 1336—1366.

Control over
interest.

(3) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part (*x*), and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper (*y*).

For example, if a valid tender has been made, interest might be withheld from date of tender, and if presentment for payment was delayed interest might be disallowed (*z*). As to interest reserved by the bill itself, see sect. 9 (1), *ante*. Interest by way of damages is usually given at the rate of 5 per cent. (*a*).

Transferor by
delivery and
transferee.

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a “transferor by delivery.”

See holder defined by sect. 2, *ante*; bill payable to bearer by sect. 8 (3), *ante*; and negotiation by sect. 31, *ante*. When a bill is transferred by delivery, the trans-

(*x*) See rate reduced. *Ward v. Morrison* (1842), Car. & M. 136; and see per Cotton, L.J., in *Webster v. British Empire Co.* (1880), 15 Ch. D. at pp. 175, 176.

(*y*) *Keene v. Keene* (1857), 3 C. B. N. S. 144; cf. *Ackermann v. Ehrensperger* (1846), 16 M. & W. at p. 103; *Laing v. Stone* (1828), 2 M. & Ry. 562.

(*z*) *Dent v. Dunn* (1812), 3 Camp. 296 (tender); see, further, *Murray v. East India Co.* (1821), 5 B. & Ald. 204 (holder dead and no demand of payment made); *Phillips v. Franklin* (1820), Gow, 196 (bill payable at particular place, and no demand there proved); cf. *Bann v. Dalzell* (1828), M. & M. 228.

(*a*) *Re Commercial Bank* (1887), 36 Ch. D. at p. 529; *Keene v. Keene* (1857), 3 C. B. N. S. 144; as to claiming interest in specially indorsed writ on pleadings, see *Bullen and Leake*, ed. 8, p. 80.

action is frequently spoken of in the cases as a sale of the bill. In mercantile phraseology sale has a different meaning, see *ante*, p. 98. § 58.

(2) A transferor by delivery is not liable on the instrument (*b*). Not liable on instrument.

Further, a transferor by delivery is not liable on the consideration in respect of which he has transferred the bill, if the bill be dishonoured (*c*), unless (1) the bill was given in respect of an antecedent debt (*d*), or (2) it appears that the transfer was not intended to operate in full and complete discharge of such liability (*e*).

The transferee, in order to avail himself of the above exceptions, must use reasonable diligence in endeavouring to obtain payment, and in giving notice of dishonour or repudiating the transaction (*f*). For example:—

1. D., the holder of a bill for 100*l.*, which has been indorsed in blank, discounts it with a banker for 90*l.* without indorsing it. The bill is dishonoured. D. is not liable to refund the 90*l.* (*g*).

2. D. changes a banker's note or cashes a cheque payable to bearer for the convenience of the holder. If the bank has stopped payment, or the cheque is dishonoured, D. can recover the money (*h*).

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee Warranty by transferor.

(*b*) *Ex parte Roberts* (1798), 2 Cox, 171; *Fenn v. Harrison* (1790), 3 T. R. 757; see also sect. 23.

(*c*) *Read v. Hutchinson* (1813), 3 Camp. 352; cf. *Van Wart v. Woolley* (1824), 3 B. & C. at p. 445, Abbott, C.J.; *Evans v. Whyte* (1829), 5 Bing. 485.

(*d*) *Ward v. Evans* (1703), 2 Ld. Raym. at p. 930; cf. *Camidge v. Allenby* (1827), 6 B. & C. at p. 382, Bayley, J.; but *qu.* if this exception now applies to bank notes; *Guardians of Lichfield v. Greene* (1857), 26 L. J. Ex. at p. 142.

(*e*) *Van Wart v. Woolley* (1824), 3 B. & C. at p. 446, Abbott, C.J.

(*f*) *Rogers v. Langford* (1833), 1 Cr. & M. 642; *Moule v. Brown* (1838), 4 Bing. N. C. 266; *Robson v. Oliver* (1847), 10 Q. B. 704.

(*g*) *Bank of England v. Newman* (1700), 1 Ld. Raym. 442.

(*h*) *Turner v. Stones* (1843), 1 D. & L. 122, note; *Woodland v. Fear* (1857), 26 L. J. Q. B. 202; cf. *Timmins v. Gibbins* (1852), 18 Q. B. 722 (notes paid into a bank and credited to customer).

§ 58. being a holder for value that the bill is what it purports to be (*i*), that he has a right to transfer it (*k*), and that at the time of transfer he is not aware of any fact which renders it valueless (*l*).

ILLUSTRATIONS.

1. C. discounts with D. a bill payable to bearer without indorsing it. It turns out that, unknown to C., the amount of the bill had been fraudulently altered by a previous holder. D. can recover from C. the money he paid (*m*).

2. A bill broker discounts with a bank a bill indorsed in blank by the payee. The indorser absconds, and the signatures of the drawer and acceptor turn out to be forgeries. The bank can recover the money they paid from the bill broker (*n*).

3. An agent gets a bank to discount a bill drawn and indorsed in blank by his principal, and then pays over the money to his principal. The signature of the acceptor was a forgery, but the agent did not know it. The drawer fails. The bank cannot recover from the agent (*o*).

4. The *bonâ fide* holder of a bill purporting to be drawn by A., accepted by B., and indorsed in blank by C., discounts it with a banker. It turns out that the signatures of A. and B. were forgeries, and that C., whose indorsement was genuine, is insolvent. The banker can recover from the holder the money he paid (*p*).

When the transferee discovers the defect in the bill, he must repudiate the transaction with reasonable diligence (*q*).

There is some confusion in the cases owing to the distinction between the warranty of genuineness and the liability on the consideration having been lost sight of. The warranty of genuineness is an incident of the contract

(*i*) *Gompertz v. Bartlett* (1853), 23 L. J. Q. B. 65 (bill void for want of stamp); cf. *Pooley v. Brown* (1862), 31 L. J. C. P. 134; *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84 (altered bank note).

(*k*) *Story* on Promissory Notes, § 118, no English decision. Cf. New York Negotiable Instruments Law, § 115.

(*l*) Cf. *Fenn v. Harrison* (1790), 3 T. R. at p. 759; *Delaware Bank v. Jervis* (1859), 20 New York R. 228; *Bridge v. Batchelor* (1864), 91 Massachusetts R. 394.

(*m*) *Jones v. Ryde* (1814), 5 Taunt. 488; cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

(*n*) *Fuller v. Smith* (1824), R. & M. 49.

(*o*) *Ex parte Bird* (1851), 4 De G. & S. 273.

(*p*) *Gurney v. Womersley* (1854), 24 L. J. Q. B. 46; *Merriam v. Wolcott* (1861), 85 Massachusetts R. 258.

(*q*) *Pooley v. Brown* (1862), 31 L. J. C. P. 134.

of sale, and it is immaterial whether the thing sold be a bill or any other personal chattel. The transferor is for this purpose an ordinary vendor (*r*). In New York the warranty is more extensive than in England. The transferor of a note warrants the solvency of the maker at the time of transfer (*s*). The holder of a bill who presents it for payment, though he parts with the bill and gets the money, is not in the position of a vendor. He does not guarantee the genuineness of the instrument (*t*).

§ 58.

Accommodation Party and Person Accommodated.

When a person draws, indorses, or accepts a bill for the accommodation of another, the person accommodated impliedly engages (*a*) that he will provide funds for the payment of the bill at maturity; (*b*) that if, owing to his omission so to do, the accommodation party is compelled to pay the bill, he will indemnify that party (*u*). For example:—

Contract of indemnity on accommodation bill.

1. B. accepts a bill to accommodate the drawer. The drawer sends funds to B. to provide for the bill, but becomes bankrupt before the bill matures. B. can retain those funds to pay the bill with (*x*).

2. A. signs a bill as drawer to accommodate the acceptor. It is dishonoured. A. receives no notice of dishonour, but nevertheless pays half the amount of the bill to the holder. A. cannot, it seems, recover this sum from the acceptor, for he has not paid under compulsion (*y*).

3. B. accepts a bill to accommodate the drawer, but is not provided with funds to pay it. There is some *prima facie* defence against the holder. B. is sued, defends the action, and has to pay the amount of the bill and costs. B. can recover from the drawer the amount he paid, including the costs of defending the action (*z*).

(*r*) *Meyer v. Richards* (1895), 165 N. S. R. at p. 405, Sup. Ct. U. S., reviewing English and American cases.

(*s*) *Roberts v. Fisher* (1870), 43 New York R. 159; cf. New York Negotiable Instruments Law, § 115, and notes in *Crawford's* edition.

(*t*) *Guarantee Trust Co. of New York v. Hannay* (1918), 23 Com. Cas. 399, 402, O. A.; (1918) 2 K. B. 623, 631, C. A.

(*u*) *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Sleigh v. Sleigh* (1850), 5 Exch. at pp. 516, 517, Parke, B.; cf. *Hawley v. Beverley* (1843), 6 M. & Gr. at p. 227; *Asprey v. Levy* (1847), 16 M. & W. 851.

(*x*) *Yates v. Hoppe* (1850), 19 L. J. C. P. 180.
(*y*) *Sleigh v. Sleigh* (1850), 5 Exch. 514; but see *Ex parte Bishop* (1880), 15 Ch. D. at pp. 410, 417, C. A.

(*z*) *Stratton v. Mathews* (1848), 3 Exch. 48; *Baker v. Martin*
C.

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4. A bill for 200*l.*, drawn abroad, is accepted for the accommodation of the first indorser. Acceptor and indorser fail. The holder gets 100*l.* from the acceptor and 100*l.* from the indorser. The indorser's estate pays 15*s.* in the pound. The acceptor, in proving on the contract of indemnity against the indorser, can get 50*l.*, which makes the total amount paid by the indorser on the bill (150*l.*) to be at the rate of 15*s.* in the pound (*a*).

See accommodation bill and accommodation party defined, *ante*, pp. 101, 102. An accommodation party who is compelled to pay the bill has all the rights of an ordinary surety in such case, *e.g.*, he is entitled to the benefit of all securities held by the creditor (*b*). The Statute of Frauds does not require the contract of indemnity which arises out of an accommodation transaction to be in writing (*c*).

Where two or more persons become parties to a bill to accommodate some third party, their rights and liabilities between themselves are those of co-sureties, and must be determined irrespective of the position of their names on the instrument (*d*). For example:—A bill is drawn by one person and indorsed by another for the accommodation of the acceptor. The drawer has to pay the bill. He can sue the indorser for contribution as a co-surety, though he could not sue him on the bill (*e*). It is conceived that there is nothing in this rule inconsistent with the decision of the House of Lords in *Steele v. M'Kinlay* (*f*), which merely decided that the drawer could not sue the indorser on the bill. The drawer there never suggested that he was entitled to contribution from the indorser as a co-surety.

(1848), 3 Barb. 634, New York, accommodation indorser; cf. *Bagnall v. Andrews* (1830), 7 Bing. at p. 222; *Garrard v. Cottrell* (1847), 10 Q. B. 679. *Aliter* if the action be defended without reasonable cause; *Rouch v. Thompson* (1830), M. & M. 487; *Beech v. Jones* (1848), 5 C. B. 696.

(*a*) *Ex parte European Bank* (1871), L. R. 7 Ch. 103.

(*b*) *Bechervaise v. Lewis* (1872), L. R. 7 C. P. at p. 377; *Gray v. Seckham* (1872), L. R. 7 Ch. 680.

(*c*) *Batson v. King* (1859), 4 H. & N. 739.

(*d*) *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350; *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P. C.; cf. *Batson v. King* (1859), 4 H. & N. at p. 741.

(*e*) *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350.

(*f*) *Steele v. M'Kinlay* (1880), 5 App. Cas. 754; see, further, sect. 56 and notes thereto, *ante*.

Discharges.

[*Discharge of Bill.*—A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument (*g*).

A right of action on a bill must be distinguished from a right of action which a party to a bill may have arising out of the bill transaction, but wholly independent of the instrument. The former can be transferred by negotiating the instrument, the latter cannot. The former is extinguished by the discharge of the instrument, the latter may or may not be so. For example, if one of three joint acceptors pays a bill, it is discharged; but he personally has a right of contribution from his co-acceptors (*h*). If an accommodation acceptor pays a bill it is discharged, but he has a personal right of action for indemnity. If an acceptance be given for a debt, and the acceptance is paid, both the debt and the bill are discharged.

Discharge of Parties.—Again, the discharge of a bill must be distinguished from the discharge of one or more of the parties thereto, *e.g.*, the acceptor may be discharged by a discharge in bankruptcy, while the drawer and indorsers are only liberated to the extent of the dividends or composition received by the holder (*i*); or a particular indorser may be discharged by want of notice of dishonour, while the drawer and other indorsers remain liable; or, again, an indorser may be discharged as regards a particular party, but not as regards subsequent parties (*k*).]

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor (*l*). Payment in due course.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (*m*).

(*g*) *Harmer v. Steele* (1849), 4 Exch. 1, Ex. Ch.; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; cf. *Burbridge v. Manners* (1812), 3 Camp. at p. 194 (payment); *Cundy v. Marriott* (1831), 1 B. & Ad. 696 (stamp).

(*h*) *Harmer v. Steele* (1849), 4 Exch. at p. 14; see the converse, *Houle v. Baxter* (1802), 3 East, 177.

(*i*) *Re Joint Stock Discount Co.* (1870), L. R. 10 Eq. 11; *Re Jacobs* (1875), L. R. 10 Ch. 211 (composition under Bankruptcy Act, 1869).

(*k*) Cf. *O'Keefe v. Dunn* (1815), 6 Taunt. 315; and sect. 48 (1).

(*l*) *Morley v. Culverwell* (1840), 7 M. & W. at p. 182, per Parke, B.; New York Negotiable Instruments Law, § 200.

(*m*) See holder defined by sect. 2; good faith by sect. 90; and defect of title by sect. 29 (2); see New York Negotiable Instruments Law, § 148.

§ 59.

Payment in
due course.

No definition of payment is attempted, for "payment" is not a technical term (*n*). The holder of a bill is entitled to receive money (cf. sects. 3 (1), and 17 (2)), but when the time of payment comes he may, if he chooses, receive satisfaction in any other form. Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill (*o*). Willes, J., seems to think this principle hardly wide enough, having regard to the rule (sect. 62) that accord without satisfaction may in some cases suffice (*p*); and note also sect. 63 (cancellation), and sect. 64 (alteration).

Completion of Payment.—Payment by a banker to a private individual is complete, and the property in the money passes to the payee, when the money is laid on the counter (*q*). As regards what constitutes complete and irrevocable payment between banker and banker where there is a clearing-house, see the special verdict in *Warwick v. Rogers* (*r*); where there is no clearing-house, see *Pollard v. Bank of England* (*s*).

Proceeding for Costs.—Where the holder of a bill sues concurrently two or more of the parties thereto and is paid by one of them, he may still proceed against the others for costs incurred (*t*).

Presumption of Payment.—It seems that there is a presumption of payment in the case of a bill or note

(*n*) See per Maule, J., *Maillard v. Argyle* (1843), 6 M. & Gr. at p. 45; cf. *Glasscock v. Balls* (1889), 24 Q. B. D. at p. 16.

(*o*) See, e.g., cases discussed on this basis: *Cripps v. Davis* (1843), 12 M. & W. 159 (agreement to set off another debt); *Sibree v. Tripp* (1846), 15 M. & W. 23 (negotiable bill for less amount); *Ford v. Beech* (1848), 11 Q. B. 852, Ex. Ch. (agreement to suspend); *Ansell v. Baker* (1850), 15 Q. B. 20 (merger); *Belshaw v. Bush* (1851), 11 C. B. 207 (bill of third party); *Woodward v. Pell* (1868), L. R. 4 Q. B. 55 (debtor taken in execution). As to payment in bonds, see *Schroder's Case* (1870), L. R. 11 Eq. 131.

(*p*) Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 126; *Abrey v. Cruz* (1869), L. R. 5 C. P. at p. 44.

(*q*) *Chambers v. Miller* (1862), 32 L. J. C. P. 30.

(*r*) *Warwick v. Rogers* (1843), 5 M. & G. 340; and *London Banking Corp. v. Horsnail* (1898), 3 Com. Cas. 105, as to "bankers' payments."

(*s*) *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623.

(*t*) *Randall v. Moon* (1852), 21 L. J. C. P. 226, as explained by *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127; *London and Sub. Bank v. Walkinshaw* (1871), 25 L. T. N. S. 704.

which is twenty years old, quite apart from the Statute of Limitations (*u*).

§ 59.

Part payment of a bill in due course operates as a discharge *pro tanto* (*x*). As to part payment by the drawer or an indorser, see *post*, p. 233. Under the continental codes the holder cannot refuse part payment; but this is clearly not English law.

Partpayment.

Payment in order to operate as a discharge of the bill must be made by or on behalf of the drawee (*y*) or acceptor (*z*). For example:—

By whom
payment must
be made.

1. A bill is accepted by three joint acceptors (not partners). One of them pays it at maturity. The bill is discharged and cannot be again negotiated. It is immaterial that the acceptor who paid accepted the bill for the accommodation of the other two (*a*).

2. A bill accepted payable at a bank and indorsed in blank by C. is sent to D. to collect. D. improperly discounts it. To regain possession, D. goes to the acceptor's bankers, pays in the amount of the bill, and asks to have the bill given up to him, when the holder has been paid. This is done. The bill is not discharged. C. can sue the acceptor (*b*).

3. C. is the holder of a dishonoured bill indorsed in blank. D. pays the amount and costs to C. in order to get the bill and sue on it. C. parts with the bill under the impression that D. has paid it on behalf of the acceptor. The bill is not discharged. D. can sue the drawer (*c*).

4. A joint and several note is paid at maturity by one of the makers. The note is discharged (*d*).

(*u*) Cf. *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

(*x*) *Graves v. Key* (1832), 3 B. & Ad. 313; cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 125, Willes, J.; French Code, Art. 126; German Exchange Law, Arts. 38, 39.

(*y*) *Wilkinson v. Simson* (1838), 2 Moore, P. C. at p. 287, Parke, B. (*z*) *Callow v. Lawrence* (1814), 3 M. & S. at p. 97, Ld. Ellenborough; *Jones v. Broadhurst* (1850), 9 C. B. at p. 181, Cresswell, J.

(*a*) *Harmer v. Steele* (1849), 4 Exch. at pp. 13, 14, Ex. Ch.; cf. *Bartrum v. Caddy* (1838), 9 A. & E. 275 (note on demand paid by accommodation maker).

(*b*) *Deacon v. Stodhart* (1841), 2 M. & Gr. 317; *Thomas v. Fenton* (1847), 5 D. & L. 28, see at p. 38; cf. *Walter v. James* (1871), L. R. 6 Ex. 124; and sub-sect. (2).

(*c*) *Lyon v. Maxwell* (1868), 18 L. T. N. S. 28; and sub-sect. (2).

(*d*) *Beaumont v. Greathead* (1846), 2 C. B. 494.

§ 59. 5. The payee of a note payable on demand takes also a mortgage to secure the debt. He then transfers the mortgage, getting the amount of the note. Afterwards he indorses the note to a holder in due course. The note is not paid (e).

By sect. 89, provisions as to the acceptor of a bill apply, *mutatis mutandis*, to the maker of a note. Thus, discharge of the instrument in Illustrations 1 and 4 would not prejudice any right to contribution or indemnity against the co-acceptors or co-makers, for such right is independent of the instrument. Illustrations 2 and 3 exemplify the rule of English law, that payment of a debt by a stranger does not discharge it. In countries where the civil law prevails payment by a stranger operates as a discharge, according to the maxim, *Debitorem ignarum seu etiam invitum solvendo liberare possumus*.

To whom
payment must
be made.

Subject to the special provisions of the Act for the protection of bankers (f), payment, in order to operate as a discharge, must be made to the holder, or some person authorized to receive payment on his behalf (g).

See "holder" defined by sect. 2, *ante*, and "good faith" defined by sect. 90, *post*. For example:—

1. A bill is indorsed payable to John Smith or order. Another person of the same name gets the bill and presents it. The acceptor pays him. The bill is not discharged. The acceptor is still liable to the real John Smith (h).

2. A bill indorsed in blank is stolen. The thief presents it to the acceptor at maturity, and obtains payment. If the acceptor pays him in good faith the bill is discharged, for the thief is the holder (i).

3. The indorsee of a bill has obtained it by fraud. He

(e) *Glasscock v. Balls* (1889), 24 Q. B. D. 13, C. A.

(f) See sect. 60 (forged indorsement on demand drafts); sect. 80 (crossed cheques); and see sect. 72 (2) and notes as to conflict of laws.

(g) Cf. sect. 45 (3), presentment for payment; *Leftley v. Mills* (1791), 4 T. R. at p. 175; *Walker v. Macdonald* (1848), 2 Exch. at p. 532; *Roberts v. Tucker* (1851), 16 Q. B. at p. 569, Ex. Ch.; *Pothier*, Nos. 164—167; *Nouguier*, § 889. See also sect. 7 (3) and sect. 24, *ante*.

(h) See sect. 24, and *Graves v. American Bank* (1858), 17 New York R. 205; cf. *McEntire v. Potter* (1889), 22 Q. B. D. at p. 441.

(i) *Smith v. Sheppard* (1776), cited *Chitty on Bills*, 10th ed. p. 180, n.

presents it at maturity to the acceptor, who pays him in good faith. The bill is discharged (*k*). § 59.

As to lost bills, see sect. 70, *post*; and as to bills in sets, see sect. 71 (5) and (6), *post*. Where a bill is held wrongfully the acceptor may set up the *jus tertii* (*ante*, pp. 62, 112). If he only suspects that the bill is held wrongfully he must act at his peril.

Holder's identity.—Under some continental codes, when a bill is payable specially, and the holder is unknown to the payer, he is bound to give some proof of identity: *Nouguier*, § 896, and this appears to be the law in the United States (*l*). In England, it is conceived that possession is *prima facie* evidence of identity (*m*), and that if the payer doubts the identity of the person presenting, or the genuineness of the instrument, he must pay or refuse payment at his own risk. There is a dictum by Maule, J., that in such case the payer would be allowed a reasonable time to make inquiry (*n*): but having regard to the duties of the holder this seems very questionable. The usual practice is to offer to pay under an indemnity.

Payment, to operate as a discharge, must be made at or after the maturity of the instrument (*o*). Payment by the drawee or acceptor before maturity operates as a mere purchase of the instrument, and, subject to sect. 61, he may, if the form of the bill permit, re-issue, and further negotiate it (*p*). Premature payment, or any other premature discharge, is of course valid *inter partes*. Thus:—

1. Accepted bill payable three months after date. A month before it matures the holder indorses it for value to the acceptor. The next day the acceptor indorses it to D. D. can sue all parties to the bill (*q*).

2. An accepted bill payable three months after date is held by C. A month before it matures the acceptor pays

(*k*) Cf. *Roberts v. Tucker* (1851), 16 Q. B. at p. 576.

(*l*) *Daniel*, § 1618. It certainly is the practice.

(*m*) Cf. *Bulkeley v. Butler* (1824), 2 B. & C. at p. 441, per Bayley, J.

(*n*) *Roberts v. Tucker* (1851), 16 Q. B. at p. 578; cf. *Paget on Banking*, ed. 2, p. 43.

(*o*) *Burbridge v. Manners* (1812), 3 Camp. at p. 194; *Beaumont v. Greathead* (1846), 2 C. B. 494, note; French Code, Arts. 144—146.

(*p*) *Morley v. Culverwell* (1840), 7 M. & W. 174; see at p. 182, Parke, B.; *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; cf. German Exchange Law, Art. 10.

(*q*) *Ibid*.

§ 59. C., but C. retains the bill. The next day C. indorses it to D., who takes it for value and without notice of the payment. D. can sue the acceptor (*r*).

3. The acceptor of a bill settles with a drawer before the bill matures. It turns out that the bill was outstanding in the hands of a third party. The acceptor must pay the holder, but can recover the amount from the drawer as money paid to his use (*s*).

Payment by
drawer or
indorser.

(2) Subject to the provisions hereinafter contained (*t*), when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill (*u*).

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill (*x*).

ILLUSTRATIONS.

1. The acceptor of a bill, originally payable to drawer's order, dishonours it. The drawer pays the holder and gets the bill. He may either sue the acceptor himself, or he may strike out his own

(*r*) Cf. *Dod v. Edwards* (1827), 2 C. & P. 602 (premature release); French Code, Art. 144; *Cripps v. Davis* (1843), 12 M. & W. 159; *Ingham v. Primrose* (1859), 7 C. B. N. S. 82.

(*s*) *Hawley v. Beverley* (1843), 6 M. & Gr. 221.

(*t*) See sub-sect. (3) as to accommodation bills.

(*u*) Cf. *Williams v. James* (1850), 15 Q. B. at p. 505. *Aliter* in America if payee had indorsed in blank: *Daniel*, § 1240; *Gardner v. Maynard* (1863), 89 Massachus. R. 456; cf. New York Negotiable Instruments Law, § 202.

(*x*) *Jones v. Broadhurst* (1850), 9 C. B. 173; *Kemp v. Balls* (1854), 10 Exch. 607; *Woodward v. Pell* (1868), L. R. 4 Q. B. 55; cf. New York Negotiable Instruments Law, § 202.

and the subsequent indorsements and again negotiate the bill away (y).

§ 59.

Payment by
drawer or
indorser.

2. The acceptor of a bill becomes bankrupt. C., a holder of the bill, who had indorsed it away before the bankruptcy, takes it up after the bankruptcy. C. can set off the bill against any claim the acceptor's trustee may have against him (z).

3. The C. Bank discount a bill, which is accepted payable at their house, and then indorse it away. At maturity it is presented to the C. Bank and paid. It is a question of fact whether they paid as the agents and bankers of the acceptor, or whether they took up the bill as indorsers. In the latter case it is not discharged, and they can sue the drawer, or if he be a customer, debit him with the amount of the bill (a).

4. The indorser of a bill writes to the drawer promising to "retire" it, and accordingly takes it up before maturity. The bill is not discharged (b).

The House of Lords has held that the drawer or indorser of a bill who pays it is a quasi-surety for the acceptor, and that the analogy is sufficiently close to entitle him to the benefit of any securities deposited by the acceptor with the holder, and retained by the holder at the time of the dishonour of the bill (c). Suppose the drawer or indorser after payment again indorses the bill away. Who would then be entitled to the benefit of the securities? This raises a difficulty which was not adverted to in the case.

When a bill is paid wholly or in part by the drawer or by an indorser, and the holder retains possession of the bill, he holds it as trustee for such drawer or indorser, as regards the amount received (d); provided that, when the acceptor of a bill becomes bankrupt, any payment made by the drawer or an indorser to the holder must be

(y) *Callow v. Lawrence* (1814), 3 M. & S. 95; *Hubbard v. Jackson* (1827), 4 Bing. 390; *Elsworth v. Brewer* (1831), 28 Massachus. R. 315.

(z) *McKinnon v. Armstrong* (1877), 2 App. Cas. at p. 539, H. L.

(a) *Pollard v. Ogden* (1853), 2 E. & B. 459.

(b) *Elsam v. Denny* (1854), 15 C. B. 87; see at p. 94, as to the meaning of "retire," but see a different construction put on the term, *Ex parte Reed* (1872), L. R. 14 Eq. at p. 593.

(c) *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, H. L.

(d) *Jones v. Broadhurst* (1850), 9 C. B. at p. 183; *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, Willes, J.; *Thornton v. Maynard* (1875), L. R. 10 C. P. 695. See *ante*, p. 143, as to the effect of this, if holder sues.

§ 59.

deducted from the amount for which the holder is entitled to prove against the acceptor's estate (e).

The right of the holder to retain the bill when he has been paid by the drawer or an indorser depends on the arrangement between them (f). In France and other countries where the civil law is followed, payment by the drawer or an indorser discharges the bill. See *Pothier*, No. 106.

Payment of
accommodation
bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

ILLUSTRATION.

A bill is accepted for the accommodation of the drawer. The drawer negotiates the bill, and then takes it up at maturity. Subsequently he re-issues it. The holder cannot sue the acceptor, for the bill is discharged (g).

See note to sect. 28, defining "accommodation bill." The discharge may be supported on the ground adopted by Willes, J., that the person accommodated pays as the acceptor's agent, or on the ground that the bill has been paid by the party ultimately liable. See *post*, p. 251, as to principal and surety; and sect. 36 (2), *ante*, as to equities attaching to overdue bill.

Recovery by Payor of Money paid by Mistake.

Recovery
by payor of
money paid
by mistake.

Where payment of a bill or note is made by mistake to a person who is not entitled to receive payment, and who

(e) *Ex parte Taylor* (1857), 26 L. J. Bank. 58; *Ex parte Mazoudoff* (1868), L. R. 6 Eq. 582.

(f) *Jones v. Broadhurst* (1850), 9 C. B. at p. 183; cf. *Woodward v. Pell* (1868), L. R. 4 Q. B. 55, as to a lien for costs; and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at pp. 17, 18.

(g) *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, Willes, J.; see also *Lazarus v. Cowie* (1842), 3 Q. B. 459, criticised but followed in *Jewell v. Parr* (1853), 13 C. B. 909, apparently approved, *Parr v. Jewell* (1855), 16 C. B. 684, at p. 709, Parke, B., Ex. Ch.; *Jones v. Broadhurst* (1850), 9 C. B. at pp. 181 and 189; *Ralli v. Denmiston* (1851), 6 Exch. 483, 36th plea and judgment at p. 493; *Strong v. Foster* (1855), 17 C. B. at p. 222; *Re Oriental Bank* (1871), L. R. 7 Ch. at p. 102; New York Negotiable Instruments Law, §§ 200, 202.

cannot give a discharge, the money so paid may be recovered back by the payor as follows:—

§ 59.

- (1) The payor of a forged, altered, or cancelled bill, who has been directly induced to pay it by the negligence of his correspondent or customer, and has not himself been guilty of negligence, can recover the money so paid from such correspondent or customer. For example:—

1. A. draws a cheque on his bankers for 50*l.*, carelessly leaving a blank space before the words and figures “fifty.” The holder fills it up as a cheque for 150*l.*, and obtains payment. The banker can charge A. with the amount so paid (*h*).

2. A. draws in the ordinary way a cheque for 50*l.* It is altered to 150*l.* The alteration is not apparent. A.’s banker pays it. He can only charge A. with 50*l.* (*i*).

3. A cheque for 10*l.* is drawn on a joint account by three trustees. A space is left before the words and figures “ten,” and one of the trustees fraudulently fills it up as a cheque for 110*l.*, and gets the money. The bank cannot charge the joint account with the 110*l.* (*k*).
Sed qu.?

4. A. draws a bill on B., and indorses it in blank. Subsequently, intending to cancel it, he tears it into four pieces and throws the pieces away. C. picks up the pieces, pastes them together, and presents the bill to B. and obtains payment. If the marks of cancellation are apparent, B. cannot recover the money so paid from A. (*l*).

5. Bill accepted to accommodate the drawer. The drawer having failed to discount it, the acceptor tears it in half and throws the pieces into the street. The drawer picks up the pieces in the acceptor’s presence, and afterwards joins them together, and negotiates the bill. The bill looks as if it might have been divided for safer

(*h*) *Young v. Grote* (1827), 4 Bing. 253. This case has continually been criticised. See *Illust. 3*, and *Scholfield v. Londesborough*, (1895) 1 Q. B. 536, C. A.; and A. C., (1896) 514, H. L. But its authority is now re-established by the House of Lords in *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777.

(*i*) *Hall v. Fuller* (1826), 5 B. & C. 750.

(*k*) *Colonial Bank of Australasia v. Marshall*, (1906) A. C. 565, P. C.; criticised *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, H. L.

(*l*) *Scholey v. Ramsbottom* (1810), 2 Camp. 485; see *ante*, p. 106, and sect. 63.

§ 59. transmission by post. The acceptor is (perhaps) liable to a holder in due course (*m*).

6. A bill held under a forged indorsement is presented to B. for acceptance. B. accepts it payable at his bankers. The bankers pay it. They cannot charge B. with the amount (*n*).

The modern tendency was to minimise the effect of negligence on the part of the customer or correspondent (*o*). But the House of Lords have now confirmed the old doctrine that the customer is bound to use reasonable care, so as not to facilitate frauds on the banker (*p*).

(2) A banker who, as drawee, pays a genuine cheque held under a forged or unauthorized indorsement, can recover the money so paid from the drawer or debit him with it in account (*q*).

(3) The payor can recover the money paid from the person who received it when such person did not act *bonâ fide* in demanding payment of the bill (*r*).

(4) Subject to the provisions of the Act as to a collecting banker in the case of a crossed cheque (*s*), the payor can recover the money paid from the person who received it when such person acted *bonâ fide* in demanding payment of the bill, provided (a) that the payor was not guilty of negligence in making the payment, and (b) that the position of the party receiving payment has not been prejudiced before the discovery of

(*m*) *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, often criticised, but said by Collins, M.R., "to be sound in principle, if wrong on the facts": *Nash v. De Freville*, (1900) 2 Q. B. 72, at p. 89.

(*n*) *Robarts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.; cf. *Vagliano's Case*, (1891) A. C. at pp. 117, 131.

(*o*) Cf. *Kepitigalla and Rubber Estates Co. v. National Bank of India*, (1909) 2 K. B. 1010, 1025 (entries in pass-book); *Colonial Bank of Australasia v. Marshall*, (1906) A. C. at p. 568, P. C.

(*p*) *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, H. L. (altered cheque).

(*q*) Sect. 60, *post*, and 16 & 17 Vict. c. 59, § 19, *post*, p. 387.

(*r*) *Martin v. Morgan* (1819), 3 Moore, 635; *Kendal v. Wood* (1871), L. R. 6 Ex. 243.

(*s*) See sect. 82, *post*.

the mistake and notification thereof (*t*). For example:— § 59.

1. A cheque is presented and paid. Directly after the payment the bankers discover that the drawer's account was overdrawn. They cannot recover the money so paid from the holder of the cheque (*u*).

2. A bill, purporting to be drawn by A. on B., is paid by B. Subsequently B. discovers that A.'s signature was a forgery. B. cannot recover the money from the *bonâ fide* holder to whom he paid it (*x*).

3. C., the holder of a bill purporting to be accepted payable at a bank, indorses it to D. for collection. D. obtains payment, and hands the money over to C. A week after the payment the bank discovers that the acceptance was a forgery. The bank cannot recover the money from C. (*y*).

4. A bill, purporting to bear the indorsement of C., is held by F. It is dishonoured. X. pays it *supra protest* for C.'s honour. The same day he discovers that C.'s indorsement was a forgery, and gives notice to F. X. can (perhaps) recover the money from F. (*z*).

5. C., the indorser of a bill, pays D., the holder, in ignorance that he has been discharged by D.'s omission to present it for payment. A week after he discovers this fact. C. can recover the money he paid from D. (*a*).

6. C. is the holder of a bill purporting to be accepted by B., payable at his bankers. The bankers pay the bill. Next day they discover that the acceptance was a forgery, and give notice to C. They cannot recover the money from C. (*b*).

7. Money is placed in the hands of an agent to pay off certain outstanding acceptances. X. falsely represents that he holds one of these acceptances, and gets paid. Either the agent or the principal can recover the money from X. (*c*).

(*t*) *Kerrison v. Glyn, Mills & Co.* (1911), 17 Com. Cas. 41, at p. 54, H. L.

(*u*) Cf. *Chambers v. Miller* (1862), 32 L. J. C. P. 30.

(*x*) *Price v. Neal* (1762), 3 Burr. 1355; cf. sect. 54 (2), *ante*.

(*y*) *Smith v. Mercer* (1815), 6 Taunt. 76.

(*z*) *Wilkinson v. Johnson* (1824), 3 B. & C. 428; but cf. *Phillips v. im Thurn* (1866), L. R. 1 C. P. 463.

(*a*) *Milnes v. Duncan* (1827), 6 B. & C. 671; cf. *Kelly v. Solari* (1841), 9 M. & W. at p. 59.

(*b*) *Cocks v. Masterman* (1829), 9 B. & C. 902.

(*c*) *Holt v. Eley* (1853), 1 E. & B. 795.

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8. A bill held by C., and purporting to be accepted by B., is presented to B. for payment. B. inspects and pays it. Subsequently he discovers that his signature was forged. He cannot recover the money from C. (d).

9. A genuine bill fraudulently altered in amount from 10*l.* to 100*l.* is subsequently accepted and paid. Four months afterwards the acceptor discovers the fraud and gives immediate notice to the holder he paid. He can (probably) recover the money (e).

10. The acceptor of a bill held under a forged indorsement pays it on the 19th of August to a person who has taken it in good faith and for value. The forgery is discovered six weeks afterwards. The acceptor cannot recover the money so paid (f).

11. A cheque for five dollars is taken by the drawer to his bankers in Canada and certified by them. It is afterwards fraudulently altered by the drawer to a cheque for 500 dollars, thereby largely overdrawing his account, and negotiated to a holder in due course. The cheque is presented and paid. Next day the fraud is discovered, and the bank give notice to the holder. The paying bank can recover the 495 dollars from the holder (g).

The reasons given for the decisions are very conflicting. Illustrations 2, 3, and 6 might well be supported on the ground that the payor is bound to recognise the signature of his own correspondent or customer, this being matter peculiarly within his own knowledge.

The general rule of law is that when money has been paid under a mistake of fact to a person who has received it in good faith, it can be recovered back by the payor unless and until the position of the party receiving it has been altered. Mathew J. argues that in the case of a bill or note the position of the holder is necessarily prejudiced if he has received the money and the mistake is not immediately corrected. "When a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake

(d) *Mather v. Maidstone* (1856), 18 C. B. 273, at p. 295.

(e) *White v. Cent. Nat. Bank* (1876), 64 New York R. 316; cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

(f) *London & River Plate Bank v. Bank of Liverpool*, (1896) 1 Q. B. 7.

(g) *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, P. C.

is discovered at once it may be that the money can be recovered back" (*h*). The Privy Council, in a later case, say that the rule so stated must at any rate be confined to the case of bills and notes on the dishonour of which notice has to be given to some one, whether drawer or indorser, who would be discharged unless the notice were given in due time (*i*). It is to be noted that a person who in good faith presents a bill for payment does not warrant its authenticity (*k*).

The above rules do not affect the right of the true owner to recover the proceeds from the person who has wrongfully received them by an action either for conversion or for money had and received (*l*).

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60. When a bill payable to order on demand (*m*) is drawn on a banker, and the banker on whom it is drawn (*n*) pays the bill in good faith (*o*) and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the

Banker
paying
demand draft
whereon
indorsement
is forged.

(*h*) *London & River Plate Bank v. Bank of Liverpool*, (1896) 1 Q. B. 7, at p. 11; criticised *Daniel*, ed. 5, § 1372.

(*i*) *Imperial Bank of Canada v. Bank of Liverpool*, (1903) A. C. 49, at p. 58, P. C. For the general rule, see *Kerrison v. Glyn, Mills & Co.* (1911), 17 Com. Cas. at p. 54, H. L.

(*k*) *Guarantee Trust Co. of New York v. Hannay*, (1918) 2 K. B. 623, at p. 631, C. A.

(*l*) *Ogden v. Benas* (1874), L. R. 9 C. P. 513; *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; *Bobbett v. Pinkett* (1876), 1 Ex. D. 368; cf. *McEntire v. Potter* (1889), 22 Q. B. D. at p. 441; *Burn v. Morris* (1834), 4 Tyr. 485 (lost bank note); *Morison v. Kemp* (1912), 29 T. L. R. 70 (cheque drawn "per pro." by fraudulent clerk, and paid away for racing debt); *Morison v. London County and Westminster Bank*, (1914) 2 K. B. 356 (per pro. cheque); as to money had and received, see *Sinclair v. Brougham*, (1914) A. C. at p. 453, H. L.

(*m*) By sect. 73 a cheque is a bill. See sect. 10, defining what bills are in legal effect payable on demand, and sect. 3, defining bill of exchange.

(*n*) As to person acting in double capacity, *e.g.*, as banker and as treasurer to a board of guardians, see *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 183.

(*o*) See sect. 90, *post*, defining good faith.

§ 60. banker is deemed to have paid the bill in due course (*p*), although such indorsement has been forged or made without authority.

ILLUSTRATIONS.

1. A cheque is drawn payable to C. or order. It is stolen, and C.'s indorsement is forged by the thief. The bankers on whom it is drawn pay it. They can debit the drawer's account with the amount of the cheque (*q*).

2. A cheque is drawn payable to C.'s order, and handed to an agent of C.'s in payment of a debt due to C. The agent, who has no authority to indorse cheques, indorses it for C., signing "per S. K., agent," obtains payment and keeps the money. The loss falls on C. He has no remedy against the drawer or the bankers (*r*).

3. A crossed cheque payable to order is stolen from the payee. The thief forges his indorsement, and the bank on which it is drawn pays it in contravention of the crossing. The bank cannot debit the drawer's account with the cheque (*s*).

4. The manager of a bank is appointed treasurer to a Board of Guardians, and the terms of the arrangement are such as to make the guardians' account practically an account with the bank. Cheques drawn by the guardians on the treasurer are cheques drawn on a banker within the meaning of this section (*t*).

This section constitutes an exception to sect. 24. It does not protect the banker when the drawer's signature has been forged (*u*). The cases cited in the illustrations were decided upon the Stamp Act, 1853 (16 & 17 Vict. c. 59, § 19, *post*, p. 387), which is reproduced in this section so far as it relates to bills or cheques. That enactment, however, was not repealed, as it applies to certain "drafts and orders," which are not bills as defined by

(*p*) As to effect of payment in due course, see sect. 59 (1).

(*q*) Cf. *Charles v. Blackwell* (1877), 2 C. P. D. 151, at pp. 156, 157, C. A. If the cheque were stolen before it left the drawer's hands, it seems he can recover the amount from the person who presented it: *Ogden v. Benas* (1874), L. R. 9 C. P. 513.

(*r*) *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A.; cf. *Bissell v. Fox* (1885), 53 L. T. N. S. 193, C. A.

(*s*) Cf. *Smith v. Union Bank* (1875), L. R. 10 Q. B. at p. 296; *ibid.* 1 Q. B. D. at p. 35, per Lord Cairns. Such payment would not be "in the ordinary course of business." As to the payee's remedy, see sect. 79 (2); and *Bobbett v. Pinkett* (1876), 1 Ex. D. 368, 372.

(*t*) *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 183, 193, decided on 17 & 18 Vict. c. 59.

(*u*) Cf. *Orr v. Union Bank* (1854), 1 Macq. H. L. Ca. 513.

sect. 3 of the Bills of Exchange Act. It is to be noted that the 16 & 17 Vict. c. 59, was a Stamp Act which appeared to apply only to inland bills. Possibly, therefore, sect. 19 does not cover the case of a draft drawn abroad (*x*). There is no such limitation in the present section.

§ 60.

A draft drawn by one branch bank on another is not a bill of exchange within the meaning of sect. 60 of the Bills of Exchange Act, but it is a draft or order within the meaning of 16 & 17 Vict. c. 59 (*y*).

The United States adhere to the common law rule, and have no corresponding enactment. Under the continental codes generally the payor is not bound to verify the genuineness of the indorsements, and in some countries a *bonâ fide* holder can even make a good title through a forged indorsement; see sect. 72 (2), *post*, and notes thereto, as to the effect of this conflict of laws.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged (*z*). Acceptor, the holder at maturity.

ILLUSTRATIONS.

1. A bill payable after date is accepted by three joint acceptors. The holder indorses the bill before maturity to one of the acceptors. If that acceptor retains the bill till it matures, it is discharged (*a*).

2. The maker of a note payable on demand dies, having appointed the holder as his executor. The note is not discharged unless the holder has assets available for the payment of it (*b*).

3. B. makes three notes payable to C. or order, and subsequently gives C. two more notes in substitution for the first three, and to cover further advances. All the notes are payable on demand, and were given on the understanding that they should not be negotiated. C. indorses all the notes to D. After C. has

(*a*) But see *Capital and Counties Bank v. Gordon*, (1903) A. C. at p. 251, per Lord Lindley.

(*y*) *Capital and Counties Bank v. Gordon*, (1903) A. C. 240; 72 L. J. K. B. 451, H. L. But see *Ross v. L. C. and Westminster Bank*, (1919) 1 K. B. 678.

(*z*) New York Negotiable Instruments Law, § 200.

(*a*) *Harmer v. Steele* (1849), 4 Exch. 1, Ex. Ch.; but this does not prejudice his right to contribution: *ibid.* at p. 13; cf. *Mainwaring v. Newman* (1880), 2 B. & P. 120; *Foster v. Ward* (1883), 1 C. & E. 168, two firms with common partner; *Neale v. Turton* (1827), 4 Bing. 149; see, too, *Richards v. Richards* (1831), 2 B. & Ad. 447, before the Married Women's Property Acts.

(*b*) *Lowe v. Peskett* (1855), 16 C. B. 500; and *qu.* now in any case?

§ 61.

indorsed the notes, B. pays C. the amount due on the last two notes. Afterwards C. obtains the five notes from D. by fraud, and hands them to B., the maker. D. can recover from B. on these five notes (c).

As to "discharge," see *ante*, p. 227. At common law, if the acceptor or maker became the administrator of the holder, the bill or note was not discharged (d); but if he became the executor of the holder, it was discharged (e). Probably the words "in his own right" in the section negative the common law rule as to executors; cf. sect. 37, *ante*.

The rule stated in the section is a deduction from the general principle that a present right and liability united in the same person cancel each other: "There is no principle," says Best, C.J., "by which a man can be at the same time plaintiff and defendant" (f). This mode of discharge is called in the civil law *confusio*, and is recognised in all countries whose law is founded on civil law: see, e.g., as to France, *Nouguier*, §§ 1061—1065.

Express
waiver or
renunciation.

62. (1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged (g).

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before,

(c) *Nash v. De Freville*, (1900) 2 Q. B. 72, C. A.

(d) *Williams on Executors*, 7th ed. p. 1313.

(e) *Freakley v. Fox* (1829), 9 B. & C. 130; though he had to account for this amount as assets: *Williams on Executors*, 7th ed. pp. 1310—1315.

(f) *Neale v. Turton* (1827), 4 Bing. at p. 151, drawer suing on bill accepted by firm of which he was a member; but the rule no longer applies as between a partner and his firm, or two firms with a common partner, since the Judicature Acts. See R. S. C. Order 48, rule 10.

(g) *Dingwall v. Dunster* (1779), 1 Dougl. 247, Lord Mansfield; cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 126, per Willes, J.; *Pothier*, Nos. 175—183.

at, or after its maturity (*h*), but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation (*i*). § 62.

ILLUSTRATIONS.

1. The holder of a bill at maturity tells the acceptor that he renounces all claims against him, and gives up the bill to him. The bill is discharged (*k*).

2. The holder of a bill before it matures writes to the first indorser that he renounces all claim against him. The first and subsequent indorsers are discharged as regards such holder. The drawer and acceptor are not (*l*).

3. The holder of a bill verbally agrees with the drawer that he will not exercise his right of recourse against him if a certain event takes place. The event happens. The drawer is not discharged, for this is merely an oral agreement to vary the effect of a bill as drawn, and not an absolute waiver of the drawer's liabilities (*m*).

4. The holder of a note payable on demand, being in a dying state, says that he wishes to forego the debt, and by his directions a memorandum is drawn up to the effect that the note is to be destroyed as soon as it can be found. This is only the expression of an intention to cancel it, and does not operate as a renunciation (*n*).

5. B. makes a note in favour of C., who has lent him money. C. afterwards hands the note to X., who is a devisee under B.'s will, and verbally renounces his rights. This is not a discharge (*o*).

6. B. makes a note in favour of C., who advances him 500*l*. Afterwards, at the request of B., C. writes to X. saying that the advance was "a gift absolutely." This discharges the note, and C.'s executors cannot enforce it (*p*).

(*h*) *Foster v. Dawber* (1851), 6 Exch. 839, at pp. 851, 852, Parke, B.; *Pothier*, Nos. 175—183.

(*i*) See "holder in due course" defined by sect. 29; and see *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; and New York Negotiable Instruments Law, § 203.

(*k*) *Whatley v. Tricker* (1807), 1 Camp. 35, and *Foster v. Dawber*, *supra*.

(*l*) *Pothier*, Nos. 182, 183; *Nouguier*, §§ 1048, 1049; cf. *De la Torre v. Barclay* (1814), 1 Stark. 7.

(*m*) *Abrey v. Crux* (1869), L. R. 5 C. P. 37.

(*n*) *Re George, Francis v. Bruce* (1890), 44 Ch. D. 627; cf. *Smith v. Gordon* (1883), 1 C. & E. 105, before the Act.

(*o*) *Edwards v. Walters*, (1896) 2 Ch. 157, C. A. *Aliter* probably if X. had been an executor, not a devisee.

(*p*) *Re Dickinson* (1909), 101 L. T. N. S. 27.

§ 62. The words requiring the renunciation to be in writing were added in committee. They alter the English law, but bring it into accordance with Scottish law. At common law a contract cannot be discharged by accord without satisfaction. The special rule as to bills and notes partially reproduced in this section seems to have been consciously imported into the law merchant from French law (*q*). This mode of discharge is known in France as “remise volontaire,” and is recognised in countries where the civil law is followed: see *Nouguier*, §§ 1043—1052.

Cancellation.

63. (1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged (*r*).

ILLUSTRATIONS.

1. The holder of a bill strikes out the acceptor's signature, intending to cancel it. This is a waiver of the acceptance, and discharges the bill (*s*). *Aliter* if the cancellation be not apparent, and the bill be negotiated to a holder for value before maturity (*t*).

2. B. accepts the first part of a foreign bill drawn in a set of two, and sends it, as directed, to a bank to be held at the disposition of the holder of the second. The drawer, who is the holder of the second part, failing to discount it, cancels it, and directs the bank to deliver up the first to B. B. gets the first part, and cancels his acceptance. B. is discharged, and if the drawer subsequently issue a fresh second part, the holder cannot sue B. (*u*).

(*q*) See per Parke, B., in *Foster v. Dawber* (1851), 6 Exch. at p. 852.

(*r*) Cf. New York Negotiable Instruments Law, §§ 200, 201.

(*s*) Cf. *Sweeting v. Halse* (1829), 9 B. & C. at p. 369; *Yglesias v. River Plate Bank* (1877), 3 C. P. D. 60.

(*t*) *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, and *ante*, p. 106.

(*u*) *Ralli v. Dennistoun* (1851), 6 Exch. 483.

3. An agent is employed to collect a dishonoured bill. The acceptor offers to pay the amount without charges. The agent sends on this offer to his principal, but allows the bill to be cancelled before the offer is accepted. The principal refuses to agree to the offer. The agent is liable for any loss consequent on the unauthorized cancellation (*x*).

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(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority (*y*).

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided (*z*), except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers (*u*).

Alteration
of bill.

Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course (*b*), such holder may avail himself of

(*x*) *Bank of Scotland v. Dominion Bank*, (1891) A. C. 592, H. L.

(*y*) *Raper v. Birkbeck* (1812), 15 East, 17, acceptance cancelled by referee in case of need; *Wilkinson v. Johnson* (1824), 3 B. & C. 428, indorsements cancelled by payor for honour; *Novelli v. Rossi* (1831), 2 B. & Ad. 757, acceptance cancelled by bank where payable; approved *Castrique v. Imrie* (1870), L. R. 4 H. L. 435; *Warwick v. Rogers* (1843), 5 M. & Gr. 340 and 373, acceptance cancelled by bank where payable; *Prince v. Oriental Bank* (1878), 3 App. Cas. 325, P. C., note cancelled by maker's banker. And so, too, in Scotland, *Dominion Bank v. Anderson* (1888), 15 Sess. Cas. 408; cf. New York Negotiable Instruments Law, § 204.

(*z*) *Master v. Miller* (1793), 1 Smith, L. C. ed. 12, p. 803, and notes; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

(*a*) *Hamelin v. Bruck* (1846), 9 Q. B. 306; cf. *Langton v. Lazarus* (1839), 5 M. & W. 629.

(*b*) See "holder in due course" defined by sect. 29, *ante*.

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the bill as if it had not been altered, and may enforce payment of it according to its original tenour (*c*).

ILLUSTRATIONS.

1. A bill is accepted for 500*l*. The stamp is sufficient to cover 4,000*l*. After acceptance the drawer fraudulently alters the amount to 3,500*l*., and the bill gets into the hands of a holder in due course. He can recover 500*l*. (*d*).

2. A cheque for 5 dollars is taken by the drawer to his bankers in Canada, and certified by them. It is afterwards fraudulently altered by the drawer to a cheque for 500 dollars, thereby largely overdrawing his account, and negotiated to a holder in due course. The cheque is presented and paid. Next day the fraud is discovered, and the bank give notice to the holder. The paying bank can recover the 495 dollars from the holder (*e*).

3. A cheque for 10*l*. on a trust account is signed by three executors, a space being left to the left of the words and figures. One of the executors fraudulently alters the amount to 110*l*., and gets the money. The bank cannot charge the trust account with the 110*l*. (*f*). *Sed qu?*

4. A partner in a firm draws a cheque, not filling in the amount in words, but putting £2:0:0 in the space for figures. A confidential clerk misappropriates the cheque, writes "one hundred and twenty pounds" in the space for words, and alters the "2" into 120. If the bank pays this cheque it can debit the firm's account with 120*l*. (*g*).

The proviso was introduced in committee to mitigate the rigour of the common law rule in favour of a holder in due course. The proviso is not retrospective, and does not apply to Bank of England notes (*h*). At common law a material alteration, by whomsoever made (*i*), avoided and discharged the bill, except as against a party who

(*c*) New York Negotiable Instruments Law, § 205.

(*d*) *Scholfield v. Londresborough*, (1895) 1 Q. B. 536, C. A.; affirmed (1896) A. C. 514, H. L.

(*e*) *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, P. C.

(*f*) *Colonial Bank of Australasia v. Marshall*, (1906) A. C. 559, P. C.; criticised and not followed, *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, H. L.

(*g*) *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, H. L., overruling Courts below.

(*h*) *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84.

(*i*) See *Davidson v. Cooper* (1843), 11 M. & W. at p. 799; affirmed 13 M. & W. 343, alteration by stranger. It is the duty of the holder to preserve the instrument intact.

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made or assented to the alteration (*k*). Thus where a bill was altered by adding a place of payment without the acceptor's consent, and was subsequently indorsed to a holder in due course, it was laid down that the holder could not sue the indorser on the bill, for the instrument was discharged (*l*). He could only sue on the consideration. In America the rule was not quite so severe, and it was held that an alteration by a stranger, or, as it is called, "an act of spoliation," did not avoid a bill (*m*).

By sect. 97 (3), *post*, the effect of the stamp laws is expressly preserved, and this saving appears considerably to cut down the effect of the proviso. Therefore, when any question of alteration arises two points have to be considered, viz. (1) does the alteration avoid the bill under the Act? (2) if not, does it avoid the bill under the stamp laws, by making it a new instrument requiring a fresh stamp? As regards the stamp laws, it is to be noted (a) that a bill may be altered at any time before issue (*n*), and for this purpose "issue" means the first delivery of a bill to a person who takes it as a holder *for value*, so as to be able to enforce payment thereof (*o*); (b) that a bill may be altered for the purpose of correcting a mistake (*p*) and bringing the instrument into accordance with the intention of the parties at the time of issue (*q*); (c) that in any case where an adhesive stamp may be used (*r*) the bill may be re-stamped, and that the alteration abroad of a bill issued abroad does not affect it for stamp purposes in England. Subject to these qualifications, a material

Effect of
stamp laws.

(*k*) *Hamelin v. Bruck* (1846), 9 Q. B. 306.

(*l*) *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

(*m*) *Parsons on Bills*, vol. ii. p. 574; cf. *U. S. v. Spalding* (1822), 2 Mason, at p. 482, per Story, J.; *Dinsmore v. Duncan* (1874), 57 New York R. at p. 581.

(*n*) *Webber v. Maddocks* (1811), 3 Camp. 1; *Kennerly v. Nash* (1816), 1 Stark. 452; *Downes v. Richardson* (1822), 5 B. & Ald. 674; *Scholfield v. Jermyn* (1828), 3 C. & P. 374; *Wright v. Inshaw* (1842), 1 D. N. S. 802.

(*o*) *Cardwell v. Martin* (1808), 9 East, 190; *Downes v. Richardson* (1822), 5 B. & Ald. 674; *Ex parte Bignold* (1836), 1 Deac. at p. 735; *Scholfield v. Earl of Lonsborough*, (1894) 2 Q. B. 660.

(*p*) Cf. *Ex parte White* (1833), 2 Deac. & Ch. at pp. 358, 359; *Hamelin v. Bruck* (1846), 9 Q. B. at p. 310; *London and Prov. Bank v. Roberts* (1874), 22 W. R. 402.

(*q*) *Brutt v. Picard* (1824), R. & M. 37, date; *Bradley v. Bardsley* (1845), 14 M. & W. 873; *Byrom v. Thompson* (1839), 11 A. & E. 31; *Cariss v. Tattersall* (1841), 2 M. & Gr. 890.

(*r*) Stamp Act, 1891, s. 34, *post*, p. 399.

§ 64. alteration after issue renders the bill a new instrument requiring a fresh stamp (*s*). The Courts would look with less favour on stamp objections than they did formerly, and possibly some of the older cases may be open to re-consideration.

What alterations are material.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*t*).

ILLUSTRATIONS.

1. The following are material:—

A particular consideration is substituted for the words "value received" (*u*); or the date of a bill payable at a fixed period after date is altered, and the time of payment thereby postponed (*x*) or accelerated (*y*); or a bill payable three months after date is converted into a bill payable three months after sight (*z*); or the date of a cheque or bill payable on demand is altered (*a*); or the crossing of a cheque is altered (*b*); or the sum payable is altered, *e.g.*, from 105*l.* to 100*l.* (*c*); or the specified rate of interest is altered, *e.g.*, from 3 per cent. to 2½ per cent. (*d*); or a bill payable "with lawful interest" is altered by adding the words "interest at six per cent." (*e*); or a particular rate of exchange is indorsed on a bill which does not authorize this to be done (*f*); or a joint note is converted into a joint and several

(*s*) *Knill v. Williams* (1809), 10 East, 431; cf. *Suffell v. Bank of England* (1882), 9 Q. B. D. at p. 574, per Cotton, L.J.

(*t*) Cf. New York Negotiable Instruments Law, § 206.

(*u*) *Knill v. Williams* (1809), 10 East, 431; cf. *Wright v. Inshaw* (1842), 1 D. N. S. 802.

(*x*) *Outhwaite v. Luntley* (1815), 4 Camp. 179; *Hirschman v. Budd* (1873), L. R. 8 Ex. 171; *Société Générale v. Metropolitan Bank* (1873), 21 W. R. 335.

(*y*) *Master v. Miller* (1793), 1 Smith, L. C. ed. 12, p. 803; *Walton v. Hastings* (1815), 4 Camp. 223, stamp.

(*z*) *Long v. Moore* (1790), 3 Esp. 155, n.

(*a*) *Vance v. Lowther* (1876), 1 Ex. D. 176.

(*b*) See sect. 78, overriding *Simmonds v. Taylor* (1858), 27 L. J. C. P. 248.

(*c*) Cf. *Hamelin v. Bruck* (1846), 9 Q. B. 306.

(*d*) *Sutton v. Toomer* (1827), 7 B. & C. 416.

(*e*) *Warrington v. Early* (1853), 23 L. J. Q. B. 47.

(*f*) *Hirschfield v. Smith* (1866), L. R. 1 C. P. 340.

note (*g*); or a new maker is added to a joint and several note (*h*); or the name of a maker of a joint and several note is cut off (*i*); or intentionally erased (*k*); or the place of payment is altered, e.g., a bill is accepted payable at X. & Co.'s and Y. & Co. is substituted for X. & Co. (*l*); or a place for payment is added *without* the acceptor's consent (*m*); or the number on a Bank of England note is altered (*n*).

2. The following are immaterial:—

A bill payable to C. or bearer is converted into a bill payable to C. or order (*o*); or an indorsement in blank is converted into a special indorsement (*p*); or the words "on demand" are added to a note in which no time of payment is expressed (*q*); or a bill addressed to Brown & Co., under the style of Brown, Smith & Co., is accepted by them as Brown & Co., and the address is afterwards altered to make it correspond with the acceptance (*r*); or an erroneous due date is added to a bill (*s*); or the words "or order" are struck out by the acceptor in the case of a bill payable to "D. or order" (*t*).

An alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial (*u*); and it may be that even this test is not wide enough. "Any alteration," says Brett, L.J., "seems to me material which would alter the business effect of the instrument,

(*g*) *Perring v. Home* (1826), 4 Bing. 28.

(*h*) *Gardner v. Walsh* (1855), 5 E. & B. 83; cf. *Clerk v. Blackstock* (1816), Holt, N. P. 474.

(*i*) Cf. *Mason v. Bradley* (1843), 11 M. & W. 590; *Benedict v. Cowden* (1872), 49 New York R. 396, cutting off condition written at bottom of note.

(*k*) *Nicholson v. Revill* (1836), 4 A. & E. 675.

(*l*) *Tidmarsh v. Grover* (1813), 1 M. & S. 735.

(*m*) *Calvert v. Baker* (1838), 4 M. & W. 417; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; cf. *Hanbury v. Lovett* (1868), 18 L. T. N. S. 366. Qu. if the acceptor consent: *Walter v. Cubley* (1833), 2 Cr. & M. 151; and cf. *Mason v. Bradley* (1843), 11 M. & W. at p. 594; but see *Gibb v. Mather* (1832), 2 Cr. & J. at p. 262; *Saul v. Jones* (1858), 28 L. J. Q. B. 37, which show that the position of the drawer and indorsers is altered.

(*n*) *Suffell v. Bank of England* (1882), 9 Q. B. D. 555, C. A.; *Leeds Bank v. Walker* (1883), 11 Q. B. D. 84.

(*o*) *Attwood v. Griffin* (1826), 2 C. & P. 368.

(*p*) See sect. 34 (4).

(*q*) *Aldous v. Cornwell* (1868), L. R. 3 Q. B. 573; see sect. 10, *ante*.

(*r*) *Farquhar v. Southey* (1826), M. & M. 14; but see *Bank of Montreal v. Exhibit and Trading Co.* (1906), 11 Com. Cas. 250, as to adding the word "Limited" to the name of an unincorporated company.

(*s*) *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314.

(*t*) *Decroix v. Meyer* (1890), 25 Q. B. D. 343, C. A.

(*u*) *Gardner v. Walsh* (1855), 5 E. & B. 83, at p. 89.

§ 64. if used for any business purpose" (x). The materiality of an alteration is a question of law (y).

Subject to two exceptions, the holder of a bill which has been avoided by a material alteration cannot sue on the consideration in respect of which it was negotiated to him (z).

Exception 1.—If the bill was negotiated to him after the alteration was made, and he was not privy to the alteration, he may sue on the consideration (a).

Exception 2.—If the bill was altered while in his custody or under his control, he can still recover, provided (a) that he did not intend to commit a fraud by the alteration (b), and (b) that the party sued would not have had any remedy over on the bill, if it had not been altered. For example:—

1. A. sells goods to B., and draws a bill on him for the price, payable to his own order. B. accepts. The bill is subsequently altered while in A.'s possession. A. can sue B. for the price of the goods, though no action could be brought on the bill (c).

2. C. sells goods to A. A., to pay for the goods, indorses to C. a bill which he has drawn on, and which has been accepted by, a third person. The bill is altered while in C.'s hands. C. cannot sue A. for the price of the goods, for the alteration has deprived A. of his remedy on the bill against the acceptor (d).

3. Note given for an agreed debt. The payee innocently alters it by adding a stipulation for interest. He can recover in an action on the consideration, though he cannot recover on the note (e).

(x) *Suffell v. Bank of England* (1882), 9 Q. B. D. 555, at p. 568; see the test suggested by Cotton, L.J., at pp. 574, 575.

(y) *Vance v. Lowther* (1876), 1 Ex. D. 176; *Peizer v. Lefkowitz*, (1912) 2 K. B. at p. 243.

(z) *Alderson v. Langdale* (1832), 3 B. & Ad. 660.

(a) *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; cf. *Cundy v. Marriott* (1831), 1 B. & Ad. 696.

(b) *Parsons*, vol. ii. p. 572; *Hunt v. Gray* (1871), 10 Amer. R. 232.

(c) *Atkinson v. Hawdon* (1835), 2 A. & E. 628; cf. *Sutton v. Toomer* (1827), 7 B. & C. 416, payee against maker of note.

(d) *Alderson v. Langdale* (1832), 3 B. & Ad. 660; see by way of analogy the effect at common law of the loss of a bill, *Crowe v. Clay* (1854), 9 Exch. 604.

(e) *Payana Reena v. Pana Lanu*, (1914) A. C. 618, P. C.

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Where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby (*f*). Cf. sect. 63 (3), *ante*.

Discharge of Surety by Dealings with Principal.

Where a relationship in the nature of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder having notice thereof enters into a binding agreement with the principal to give time to him, or, of his own act, discharges the principal, the surety or sureties are thereby discharged (*g*), unless the holder, in so doing, expressly reserves his rights against the surety or sureties, thereby preserving the remedy over (*h*).

Principal and surety.

For the present purpose the acceptor of a bill is *primâ facie* the principal debtor, and the drawer and indorsers are, as regards him, sureties, and the drawer of a bill is the principal as regards the indorsers, and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order (*i*); but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal (*k*). For example:—

1. The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which

(*f*) *Knight v. Clements* (1838), 8 A. & E. 215; *Clifford v. Parker* (1841), 2 M. & Gr. 909; cf. *Tatum v. Catomore* (1851), 16 Q. B. at p. 746; see, *e.g.*, *Cariss v. Tattersall* (1841), 2 M. & Gr. 890, as to what evidence suffices.

(*g*) *Oriental Corporation v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 318; cf. Netherlands Code, Arts. 198, 199; *aliter* after judgment obtained against both principal and surety. *Re A Debtor*, (1913) 3 K. B. 11.

(*h*) *Owen v. Homan* (1853), 4 H. L. Cas. 997; *Muir v. Crawford* (1875), L. R. 2 Sc. Ap. 456. H. L.; *Jones v. Whitaker* (1887), W. N. p. 132, C. A.; New York Negotiable Instruments Law, § 201 (6).

(*i*) Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, per Willes, J.

(*k*) *Ewin v. Lancaster* (1865), 6 B. & S. at p. 577; *Oriental Corp. v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 348.

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the drawer and indorsers are not parties. This discharges the drawer and indorsers (*l*).

2. The holder of a bill for 200*l*. takes from the acceptor 100*l*. in full discharge of his claim, but expressly reserves his rights against the drawer and indorsers (thereby preserving their rights against the acceptor). The drawer and indorsers are not discharged (*m*).

3. The holder of a bill for 100*l*. accepts a composition of 10*s*. in the pound from the acceptor under Bankruptcy Act, 1869, ss. 125, 126. The drawer and indorsers are only discharged to the extent of the sum received by the holder, for the acceptor is discharged by operation of law (*n*).

4. The holder of a dishonoured bill enters into a binding agreement to give time to the first indorser. This discharges the subsequent indorsers, but not the drawer or acceptor (*o*).

5. The holder of a bill at the request of the acceptor delays presenting it for payment. The drawer is discharged (*p*).

6. A bill is accepted by six joint acceptors. Three accept as sureties for the other three, who accept for the accommodation of the first indorser. The holder, knowing the facts, makes an arrangement with the first indorser. The acceptors are discharged (*q*).

7. A bill is accepted for the accommodation of the drawer and C. the indorser. The holder agrees to give time to C. the indorser. The acceptor is discharged (*r*).

8. C. is the holder of a joint and several note made by B. and X. X. signed merely to accommodate B., and as surety for him. C., knowing this, agrees for consideration to give time to B. X. is thereby discharged (*s*).

(*l*) Cf. *Gould v. Robson* (1807), 8 East, 576, and *Petty v. Cooke* (1871), L. R. 6 Q. B. at p. 794.

(*m*) *Muir v. Crawford* (1875), L. R. 2 Sc. App. 456, H. L.; *Jones v. Whitaker* (1887), W. N. p. 132, C. A.

(*n*) *Re Jacobs* (1875), L. R. 10 Ch. 211; cf. *Provincial Bank of Ireland v. Dunne* (1878), Ir. L. R. 2 Q. B. D. 21; *Yglesias v. River Plate Bank* (1877), 3 C. P. D. 60. But as to a voluntary composition, see *Mayhew v. Boyes* (1910), 110 L. T. N. S. 1, C. A.

(*o*) *Claridge v. Dalton* (1815), 4 M. & S. at p. 232; *Hall v. Cole* (1836), 4 A. & E. 577.

(*p*) *Latham v. Chartered Bank of India* (1874), L. R. 17 Eq. 205.

(*q*) *Ex parte Webster* (1847), De Gex, 414.

(*r*) *Bailey v. Edwards* (1864), 4 B. & S. 761.

(*s*) *Greenough v. McClelland* (1860), 30 L. J. Q. B. 15, Ex. Ch.

9. C. is the holder of a joint and several note made by B. and X. C. knows that X. signed as surety to accommodate B. B. pays C. It turns out afterwards that this payment was a fraudulent preference. C. refunds the money to B.'s trustees. X. is not discharged by B.'s payment (*t*).

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10. A bill is accepted for the accommodation of the drawer. After it is due the holder is informed of this and then agrees to give time to the drawer. The acceptor is discharged (*u*).

11. A bill drawn by A. and accepted by B. is discounted with C. C. subsequently discovers that the bill was drawn and accepted for the accommodation of X., who is not a party to the bill, but who is to provide for it. C. then enters into an agreement to give time to X. This discharges the acceptor of the bill (*x*).

12. A note is made by a limited company, and is indorsed by three directors in succession. It appears that they all agreed to indorse the note to guarantee the company's debt. They are liable *inter se* as co-sureties, and not in succession according to the order of their indorsements (*y*).

Who are Principal and Surety.

Formerly it was held at law that where a party's name appeared on a bill as principal, *e.g.*, as acceptor, he could not be shown to be a surety, for that was a contradiction of the written instrument (*z*). This doctrine was afterwards modified in cases where it could be shown there was a contemporaneous agreement that he should be treated as a surety (*a*), and now it is clearly established that the rights of the surety arise independently of the form of the instrument. For the purpose of enforcing the debt the principal debtor on the instrument may be treated as

(*t*) *Petty v. Cooke* (1871), L. R. 6 Q. B. 790.

(*u*) *Ewin v. Lancaster* (1865), 6 B. & S. 571; cf. *Torrance v. Bank of British North America* (1873), L. R. 5 P. C. at p. 252.

(*x*) *Oriental Corp. v. Overend* (1871), L. R. 7 Ch. 142; affirmed (1874), L. R. 7 H. L. 348.

(*y*) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733, P. C.; as to admissibility of parol evidence to explain the transaction, see at p. 748.

(*z*) *Fentum v. Pocock* (1813), 5 Taunt. 192.

(*a*) *Manley v. Boycott* (1853), 2 E. & B. 46.

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such (b); but, apart from this, as soon as the creditor is affected with notice that the apparent principal was and is only a surety, the ordinary consequences which flow from that relationship ensue, and the creditor disregards them at his peril. Any such dealing with the real principal or other sureties as would ordinarily discharge a surety discharges the party liable on the bill (c). And where a principal debtor, by subsequent arrangement with his co-principal, becomes only a surety, he thereby acquires the rights of a surety as against all parties with notice of the change (d).

As to the circumstances under which a surety is discharged, there is nothing peculiar to bills or bill transactions, and the reader is referred to De Colyar on *Guarantees*, Rowlatt's *Principal and Surety*, and other works on principal and surety. But the following salient points may be noted.

Giving time.

Though a binding agreement to give time to the principal discharges the surety, whether he be injured thereby or not (e), mere delay in suing the principal or pressing him for payment does not discharge the surety. "I am far from saying," says Tindal, C.J., "that there may not be an extreme case of laches amounting to fraud, and fraud would be a defence to the action, but not mere negligence" (f).

The agreement to give time must be a binding agreement, and founded on consideration. Thus, where the executrix of the acceptor of a bill verbally promised to pay the holder out of her own estate if he would forbear to sue, and paid him interest for so forbearing, it was held that, as her promise was void, the drawer was not discharged by the delay (g).

(b) Cf. *Batson v. King* (1859), 28 L. J. Ex. 327, at p. 328.

(c) *Greenough v. McClelland* (1860), 30 L. J. Q. B. 15; *Oriental Corporation v. Overend* (1874), L. R. 7 H. L. 348, see at p. 360.

(d) *Rouse v. Bradford Banking Co.*, (1894) A. C. 586, 591, overruling *Swire v. Redman* (1876), 1 Q. B. D. 536.

(e) *Polak v. Everett* (1876), 1 Q. B. D. 669, at p. 673, C. A.

(f) *Goring v. Edmonds* (1829), 6 Bing. 94, at p. 99. See, too, *Bell v. Banks* (1841), 3 M. & Gr. 258; *Black v. Ottoman Bank* (1862), 15 Moore, P. C. 473, at p. 484; *Carter v. White* (1883), 25 Ch. D. 636, at p. 672, C. A. So, too, in Scotland, *Hay and Kyd v. Powrie* (1886), 13 Sess. Cas. 777.

(g) *Philpot v. Briant* (1828), 4 Bing. 717; cf. *Petty v. Cooke* (1871), L. R. 6 Q. B. 790.

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Again, the agreement to give time must be made with the principal debtor, and not with a third party. Thus, when the indorsee of a bill sued the drawer, it was held to be no defence that the indorsee, without the drawer's consent, had agreed with X., who was not a party to the bill, to give time to the acceptor in consideration of X.'s promise to see the bill paid (*h*).

Although mere delay in pressing the principal does not discharge the surety, yet it may do so if it be in contravention of the original contract. Thus, the defendant signed a joint and several note on demand as surety for the other maker, on the terms that the payee should demand payment of the note from the other maker within three years. The payee did not demand payment within three years, and the other maker became insolvent. Held, that the defendant was discharged (*i*). So, too, in the ordinary case, when the acceptor of a bill is the principal debtor, the drawer and indorsers are discharged, if it be not presented for payment on its due date, for such presentment is part of the original contract.

If in giving time to the principal the creditor expressly reserves his rights against the surety, the latter is not discharged: see the reason given by Lord Hatherley (*k*).

Unless the creditor reserves his rights against the surety, it is clear that discharging the principal must discharge the surety, for the accessory obligation falls with the main obligation. Thus, if the holder of a bill agrees to accept a composition from the acceptor, the drawer will be discharged, unless it be a composition or scheme under the Bankruptcy Act, when the discharge is regarded as being effected by operation of law (*l*).

Discharge of
principal.

Where two or more sureties contract severally, the creditor, by releasing one, does not discharge the others; but "when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others

Co-sureties.

(*h*) *Fraser v. Jordan* (1857), 26 L. J. Q. B. 288.

(*i*) *Lawrence v. Walmsley* (1862), 31 L. J. C. P. 143.

(*k*) *Oriental Corporation v. Overend* (1871), L. R. 7 Ch. App. at p. 150.

(*l*) *Megrath v. Gray* (1874), L. R. 9 C. P. 216; *In re Jacobs* (1875), L. R. 10 Ch. App. 208, at p. 214.

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Right to
securities.

being part of the consideration of the contract of each" (m).

"A surety," say the Privy Council, "is entitled to the benefit of all securities in the hands of the creditor, whether, when he became a surety, he knew of them or not. Thus, in *Pearl v. Deacon*, where the plaintiff was surety in a promissory note for a sum lent by the defendants to their tenant, and a mortgage was subsequently taken by the defendants on the tenant's furniture for the same debt, they afterwards, under a distress, took the same furniture for arrears of rent; it was held that, inasmuch as the produce of the furniture was first applicable to the payment of the note, the landlord could not, as against the surety, apply it to the payment of the rent, and that the surety was discharged, not, it is to be observed, absolutely, but *pro tanto*. It has been held in other cases that when a creditor wastes or improperly deals with a security, the surety is released *pro tanto*" (n). It was formerly thought that the creditor was entitled to the benefit of collateral securities given by the debtor to the surety, but this is not so (o).

Where a bill or note is part of the machinery for creating an ordinary contract of suretyship, the doctrine of the surety's right to securities applies in its entirety; but in the course of an ordinary bill the drawer and indorsers are not strictly sureties, but are in the nature of sureties for the acceptor, and their equity to securities held for the bill only attaches when the bill is dishonoured. "This equity," says Lord Selborne, "will not incapacitate bankers who hold a bill, accepted by their customer and indorsed by a third party, from carrying on their dealings with that customer by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent, and before the acceptance has been dishonoured. But it is an equity which does attach when the bills, overdue and dishonoured, and the securities are found together in

(m) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755, at p. 764.

(n) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 751, at p. 765, citing *Pearl v. Deacon* (1857), 26 L. J. Ch. 761. As to waste of security, see *Wulff v. Jay* (1872), L. R. 7 Q. B. 756; *Rainbow v. Juggins* (1880), 5 Q. B. D. 422.

(o) *Re Walker*, (1892) 1 Ch. 621.

the hands of the secured creditor at the time when he requires payment from the indorser; when the creditor has then no other transactions depending with the customer, and no claim upon the securities except for the bills themselves" (p).

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The machinery of a bill transaction will not be allowed to defeat the rules in bankruptcy as to valuation of securities. Thus, the acceptor deposited certain wool with the drawer to secure payment of the draft. The drawer indorsed the bill away, and the acceptor then became bankrupt. The indorsee, by arrangement with the drawer, proved for the full amount of the bill. The drawer claimed to retain the security for the difference between the dividend and the amount of the bill, but it was held he could not do so (q).

A contract of suretyship may be severable. Thus, where a surety guaranteed payments for goods, to be delivered by instalments, and the creditor took the debtor's promissory note for one instalment, it was held that the surety was only released as to that instalment (r).

Severable contracts.

In a case in 1866 it was held that where the debtor obtained two loans from a money club, the surety on the first note could not claim that all moneys subsequently paid in by the debtor should be credited to the first note (s).

Renewal.

When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement (t), operates merely as a conditional payment thereof. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged (u); but if the renewal bill be dis-

Effect of renewal.

(p) *Duncan v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, at p. 13, reversing S. C., 11 Ch. D. 88, C. A.; *Aga Ahmed v. Judith Crisp* (1891), 19 Ind. App. 24, P. C. (indorser of note).

(q) *Baines v. Wright* (1885), 16 Q. B. D. 330, C. A. Compare *Ex parte European Bank* (1871), L. R. 7 Ch. App. 99, as to double proof.

(r) *Croydon Gas Co. v. Dickinson* (1876), 2 C. P. D. 46, C. A.

(s) *Wright v. Hickling* (1865), L. R. 2 C. P. 199; cf. *Jones v. Gretton* (1853), 8 Exch. 773. See *Re Sherry* (1884), 25 Ch. D. 692, C. A., as to appropriation of payments.

(t) Cf. *Lewis v. Lyster* (1835), 2 C. M. & R. 704; *Lumley v. Musgrave* (1837), 4 Bing. N. C. at p. 15.

(u) *Dillon v. Rimmer* (1822), 1 Bing. 100; cf. *Soward v. Palmer* (1818), 2 Moore, 274; *Lumley v. Hudson* (1837), 4 Bing. N. C. 15.

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honoured, then, subject to the preceding rule as to principal and surety, the liabilities of the parties to the original bill revive, and they may be sued thereon (*x*).

Renewal.

Renewing a bill or note operates as an extension of the time for paying it (*y*). Hence, if a bill be renewed without the assent of all parties liable thereon as sureties, the parties so liable are discharged; see *ante*, p. 251. When there is an agreement to renew, the application for renewal must be made within a reasonable time of the maturity of the original bill, but it need not be made before its maturity (*z*). When the holder of a renewed bill could not have maintained an action on the original bill because there was no consideration for it (*a*), or the consideration was illegal (*b*), or because he was privy to some fraud connected therewith (*c*), he cannot sue on the renewed bill (*d*). A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is suspended until the dishonour of the bill. See *post*, p. 353. The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realized. It is immaterial whether the bill be payable on demand or *in futuro* (*e*).

In France, in the absence of special agreement, the renewal of a bill extinguishes the original bill by *novatio* (*f*).

(*x*) *Ex parte Barclay* (1802), 7 Ves. jr. 597; *Norris v. Aylett* (1809), 2 Camp. 329; cf. *Kendrick v. Lomax* (1832), 2 Cr. & J. 405; *Sloman v. Cox* (1834), 1 C. M. & R. at p. 472; *Fenton v. Blackwood* (1874), L. R. 5 P. C. 167.

(*y*) *Jagger Iron Co. v. Walker* (1879), 76 New York R. 521. As to the construction of a guarantee for renewal, see *Barber v. Mackrell*, (1892) W. N. at p. 133; 41 W. R. 341, C. A.

(*z*) *Maillard v. Page* (1870), L. R. 5 Ex. 312; cf. *Innes v. Munro* (1847), 1 Exch. 473; *Torrance v. Bank of British North America* (1873), L. R. 5 P. C. 246, as to construction of agreements to renew.

(*a*) *Southall v. Rigg* (1851), 11 C. B. 481; cf. *Edwards v. Chancellor* (1888), 52 J. P. 454.

(*b*) *Chapman v. Black* (1819), 2 B. & Ald. 588; *Hay v. Ayling* (1851), 16 Q. B. 423.

(*c*) *Lee v. Zagury* (1817), 8 Taunt. 114.

(*d*) See, however, two apparent but not real exceptions, *Mather v. Maidstone* (1856), 18 C. B. 273; *Flight v. Reed* (1863), 1 H. & C. 703.

(*e*) *Currie v. Misa* (1875), L. R. 10 Ex. at pp. 163, 164, Ex. Ch. As to retiring a bill by substituting a forged renewal, which is inoperative, see *Bell v. Buckley* (1856), 25 L. J. Ex. 163.

(*f*) *Nouguier*, §§ 1032—1042.

§ 65.

Acceptance and Payment for Honour.

65. (1) Where a bill of exchange has been protested for dishonour by non-acceptance (*g*), or protested for better security (*h*), and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (*i*).

Acceptance
for honour
suprà protest.

By sect. 93, *post*, it is sufficient that the bill has been noted without the protest having been actually extended.

The Act appears to enable the drawee as well as a stranger to the bill to accept for honour (*k*). The person for whose account a bill is drawn is commonly called the "third account." *Beawes*, No. 42, says that if a bill be accepted for the honour of an indorser, there may be another acceptance for the honour of any party prior to him; but this rule is believed to be obsolete (*l*). If, however, the acceptor for honour fails before the maturity of the bill, a second acceptance for honour is sometimes obtained: cf. *Story*, § 122.

In the United States, as in England, the holder may refuse to allow acceptance for honour (see *Story*, § 122), for he may wish to exercise his immediate right of recourse which arises on non-acceptance. By German Exchange Law, Arts. 56, 57, if the bill contains a reference in need the holder must resort to the case of need;

(*g*) *Mutford v. Walcot* (1698), 1 Ld. Raym. 575.

(*h*) *Ex parte Wackerbath* (1800), 5 Ves. jr. 574, and see sect. 51 (5), *ante*.

(*i*) New York Negotiable Instruments Law, § 280.

(*k*) Cf. *Beawes*, No. 42, and *Nouguier*, § 574.

(*l*) See, however, New York Negotiable Instruments Law, § 280.

§ 65. but in other cases he may refuse an acceptance for honour. In France and Holland it seems the holder cannot refuse an acceptance for honour (*m*).

Acceptance
for honour.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour *suprà* protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour :

(b) be signed by the acceptor for honour (*n*).

It would be sufficient if the acceptor for honour merely wrote "Accepted S. P." on the bill and signed it; but it is usual for him to state for whose honour he accepts. The practice is for an acceptance for honour to be attested by a notarial "act of honour" recording the transaction (*o*). A clause requiring this to be done was inserted in the bill, but was struck out in committee; so, perhaps, this is no longer essential (*p*). Cf. sect. 68 (3), as to payment for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (*q*).

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the

(*m*) See French Code, Art. 125; *Nouguier*, §§ 574, 575; Netherlands Code, Arts. 122, 123.

(*n*) New York Negotiable Instruments Law, §§ 280, 281.

(*o*) See *Brooks' Notary*, 6th ed. p. 88, and cf. *Mitchell v. Baring* (1829), 10 B. & C. 4; Indian Act, sect. 101.

(*p*) But it would scarcely be safe to omit the act of honour. Sect. 97 saves the law merchant, and for charging parties abroad the usual is certainly the safer course; cf. German Exchange Law, Art. 58; French Code, Art. 126.

(*q*) See German Exchange Law, Art. 59; *Nouguier*, § 578, and *Daniel*, § 578, to same effect. New York Negotiable Instruments Law, § 282.

date of the noting for non-acceptance, and not from the date of the acceptance for honour (*r*).

§ 65.

This sub-section brings the law into accordance with mercantile understanding, and gets rid of an inconvenient ruling to the effect that maturity was to be calculated from the date of acceptance for honour (*s*). As to noting see sect. 51 (4), *ante*.

66. (1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts (*t*).

Liability of
acceptor for
honour.

By sect. 93, *post*, it is sufficient if the bill has been noted for protest, although the protest has not been extended. As a reason for requiring presentment for payment to the drawee, Lord Ellenborough says: "Effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied if presented to him again when the period of payment had arrived" (*u*). But by sect. 51 (6), *ante*, where a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

Under the continental codes, acceptance for honour is known as acceptance by "intervention," and the acceptor for honour is in the nature of a *negotiorum gestor* (*x*).

(*r*) New York Negotiable Instruments Law, § 285.

(*s*) See *Williams v. Germaine* (1827), 7 B. & C. 468, at p. 471.

(*t*) See *Story*, § 123; *Williams v. Germaine* (1827), 7 B. & C. 468; New York Negotiable Instruments Law, § 284.

(*u*) *Hoare v. Cazenove* (1812), 16 East, 391, at p. 398.

(*x*) *Story*, § 125; *Pothier*, Nos. 113, 114; *Nouguier*, § 584.

§ 66.

Under French Code, Art. 127; Netherlands Code, Art. 127; and German Exchange Law, Art. 58, an acceptor for honour is bound to give notice of his acceptance to the person for whose honour he has accepted. The rights of the acceptor for honour arise on payment. Under German Exchange Law, Art. 65, however, an acceptor for honour who is not called on to pay the bill is nevertheless entitled to a commission of one-third per cent.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted (*y*).

It seems an acceptor for honour is bound by the estoppels which bind an ordinary acceptor, and also by the estoppels which would bind the party for whose honour he accepted (*y*); as to which see sects. 54, 55.

Presentment
to acceptor
for honour or
case of need.

67. (1) Where a dishonoured bill has been accepted for honour *suprà* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need (*a*).

By virtue of sect. 93, *post*, it is sufficient if the bill has been noted, although the protest has not been extended. As to holder's option to resort to case of need, see sect. 15, *ante*, and notes thereto.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented

(*y*) New York Negotiable Instruments Law, § 283.

(*z*) *Phillips v. im Thurn* (1866), L. R. 1 C. P. at p. 471; S. C. on demurrer (1865), 18 C. B. N. S. 694.

(*a*) Cf. *Hoare v. Cazenove* (1812), 16 East, 391; German Exchange Law, Arts. 62 and 88; New York Negotiable Instruments Law, § 286.

to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him (*b*). § 67.

This sub-section reproduces the effect of the repealed 6 & 7 Will. 4, c. 58. By sect. 92, *post*, non-business days are to be excluded in computing the time.

If the bill be not presented in due time to the acceptor for honour, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches; but there is no decision in point (*c*).

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (*d*).

See sect. 46, *ante*, as to excuses for non-presentment and delay; and cf. *Nouguier*, § 583.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him (*e*).

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it *suprà* protest for the honour of any party liable Payment for honour *suprà* protest.

(*b*) Cf. New York Negotiable Instruments Law, § 287.

(*c*) Cf. *Story v. Batten* (1830), 3 Wend. R. 486, New York; German Exchange Law, Art. 60; *Nouguier*, § 583.

(*d*) Cf. New York Negotiable Instruments Law, § 288.

(*e*) Cf. *Nouguier*, §§ 1320, 1321; *Brooks' Notary*, 4th ed. p. 108; German Exchange Law, Arts. 62 and 89; Netherlands Code, Art. 181; New York Negotiable Instruments Law, § 289.

§ 68. thereon, or for the honour of the person for whose account the bill is drawn (*f*).
 Payment for honour.

By sect. 93, *post*, it is sufficient if the bill has been noted, although the protest has not been extended. The person for whose account a bill is drawn is commonly called the "third account."

When a bill has been paid *suprà* protest it ceases to be negotiable (*g*).

Promissory notes are sometimes, though not often, paid *suprà* protest.

Payment for honour is known in continental countries as payment by "intervention," which expresses its nature as a *negotiorum gestio*. By French Code, Art. 159, such payment may be made by "tout intervenant." But this, it seems, has been interpreted to mean any person other than a party already liable on the bill; *Nouguier*, §§ 1004—1008. There appears to be no good reason for any such limitation.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference (*h*).

(3) Payment for honour *suprà* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it (*i*).

(4) The notarial act of honour must be founded

(*f*) *Geralopula v. Wieler* (1851), 20 L. J. C. P. 105; cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; *Brooks' Notary*, 4th ed. p. 108; New York Negotiable Instruments Law, § 300.

(*g*) *Ex parte Swan* (1868), L. R. 6 Eq. 344; *Nouguier*, § 1026; cf. *Deacon v. Stodhart* (1841), 2 M. & Gr. at p. 320.

(*h*) To the same effect, French Code, Art. 159; German Exchange Law, Art. 64; New York Negotiable Instruments Law, § 303.

(*i*) Cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; *Brooks' Notary*, 4th ed. pp. 108—110, and for forms, see pp. 226—228; New York Negotiable Instruments Law, § 301.

on a declaration made by the payor for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays (*k*). § 68.
Payment for honour.

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payor for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party (*l*).

ILLUSTRATIONS.

1. A dishonoured bill is held by the fifth indorsee. If X. pays it *suprà* protest for the honour of the acceptor, he acquires a right to reimbursement against the acceptor alone; if he pays for the honour of the first indorser, he can sue the first indorser and the drawer (provided they have due notice), and the acceptor, but the second and subsequent indorsers are discharged.

2. Bill accepted for the accommodation of the drawer. It is dishonoured and paid *suprà* protest by X. for the honour of the drawer. X. cannot recover from the accommodation acceptor, for he is not a party liable to the drawer (*m*).

Pothier, Nos. 113, 114, points out that the right of the payor is not, properly speaking, a right of action on the bill, but a right arising out of the quasi contract *negotiorum gestorum*; hence the payor cannot again negotiate the bill, or transfer his rights.

(*k*) New York Negotiable Instruments Law, § 302.

(*l*) *Goodall v. Polhill* (1845), 14 L. J. C. P. 146, duties, *e.g.*, notice of dishonour; *Ex parte Swan* (1868), L. R. 6 Eq. 344, rights; cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; French Code, Art. 159; German Exchange Law, Art. 63; New York Negotiable Instruments Law, § 304.

(*m*) *Ex parte Lambert* (1806), 13 Ves. 179; *Daniel*, § 1255; *Parsons on Notes and Bills*, Vol. I. p. 318. See *contrà*, *Ex parte Swan* (1868), L. R. 6 Eq. 344; but that was a case of cross accounts rather than an accommodation bill, and the words of the section are "parties liable," not "prior parties."

§ 68.

(6) The payor for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payor for honour in damages (*n*).

(7) Where the holder of a bill refuses to receive payment *suprà* protest he shall lose his right of recourse against any party who would have been discharged by such payment (*o*).

(*n*) To same effect, German Exchange Law, Art. 63; New York Negotiable Instruments Law, § 306.

(*o*) To same effect, *Nouguier*, § 1009; German Exchange Law, Art. 62; New York Negotiable Instruments Law, § 305.

§ 69.

Lost Instruments.

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

Holder's right
to duplicate
of lost bill.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

This section reproduces the effect of the repealed 9 & 10 Will. 3, c. 17, s. 3. That Act applied only to inland bills for 5*l.* or upwards (*p*). The remedy is still very inadequate, as it gives no power to obtain an indorsement or acceptance over again. The continental codes contain much more elaborate provisions on the subject: see *Nouguier*, §§ 205, 219; German Exchange Law, Art. 66.

Presumably, if the drawer, on tender of indemnity, declined to give a new bill, an action would lie to compel him, and damages might be claimed in the alternative.

As to execution of instruments by order of the Court, see the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61, s. 14), *post*, p. 393.

As to bills in a set, see sect. 71, *post*.

70. In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an

Action on
lost bill.

(*p*) But see *Walmesley v. Child* (1749), 1 Ves. senr. 341, and *Rhodes v. Morse* (1850), 14 Jur. 800 (cheque).

§ 70. indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question.

This section reproduces, with an extension in one direction, the provisions of sect. 87 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), set out *post*, p. 388. That enactment applied only to actions in the Superior Courts. The present section applies to all courts, and to all proceedings, *e.g.*, proofs in bankruptcy. The provision of the Common Law Procedure Act has not been repealed, because it applies to all negotiable instruments, and not merely to bills and notes. For form of order, see *Chitty's King's Bench Forms*, ed. 14, p. 231. In the note to the form it is said that "orders have been made at Chambers under the C. L. P. Act, 1854, s. 87, where the action is not on the bill or instrument itself, but on the consideration for it."

"If no tender of an indemnity were made before suit," says Willes, J., "the plaintiff would certainly not obtain relief on such terms as to give him the costs of the suit" (*q*).

At common law, if a negotiable bill or note were lost, no action could be maintained, either on the instrument or on the consideration for it (*r*), even if lost when overdue (*s*); but if its destruction could be proved, it seems the action would lie (*t*).

By sect. 51 (8), *ante*, protest may be made on a copy of a lost or destroyed bill.

The fact that a bill has been lost or destroyed does not excuse the omission to give notice of dishonour (*u*). As to

(*q*) *King v. Zimmerman* (1871), L. R. 6 C. P. 466, at p. 468. Note the order made in that case. See, further, *Jefferson v. Ulster Bank* (1900), 34 Ir. T. L. R. 58.

(*r*) *Pierson v. Hutchinson* (1809), 2 Camp. 211; *Crowe v. Clay* (1854), 9 Exch. 604, Ex. Ch.; *aliter*, as to a non-negotiable note, *Wain v. Bailey* (1839), 10 A. & E. 616.

(*s*) *Hansard v. Robinson* (1827), 7 B. & C. 90. But as to relief in equity, see *Macartney v. Graham* (1828), 2 Sim. 285.

(*t*) *Wright v. Maidstone* (1855), 24 L. J. Ch. 623; cf. *Edge v. Bumford* (1862), 31 L. J. Ch. 805; but see *Crowe v. Clay*, *supra*.

(*u*) *Thackray v. Blackett* (1812), 3 Camp. 164; *Daniel*, § 1464.

presentment to charge drawer and indorsers, see note, *ante*, pp. 165, 170. § 70.

By rule 252 of the Bankruptcy Rules, 1915, subject to any special order of the Court, a bill or note must be produced before proof; and by rule 269, subject to the provisions of this section, it must be exhibited before dividend. See *post*, p.

As to giving secondary evidence of lost bills, payable outside the British Islands, when the loss is attributable to the war, see sects. 2 and 3 of the Bills of Exchange Act, 1914 (4 & 5 Geo. 5, c. 82), *post*, p. 414.

§ 71.

Rules as to
sets.

Bill in a Set.

71. (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill (*x*).

If one part of a set omit reference to the rest, it becomes a separate bill in the hands of a *bonâ fide* holder (*y*). It has been held that an agreement to deliver up an unaccepted bill drawn in a set is an agreement to deliver up all the parts in existence (*z*); and also that a person who negotiates a bill of exchange drawn in a set, is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest (*a*).

In England the obligation to give a set is presumably a matter of bargain. Under the continental codes it is a matter of right, and careful machinery is provided to enforce the right. The parts of a set (*duplicata*) must be distinguished from copies (*copie*): *Nouguier*, § 209; and German Exchange Law, Arts. 70—72.

Only one part of a set requires to be stamped. The remaining parts are exempt, "unless issued or in some manner negotiated apart" from the stamped part. If the stamped part of a set be lost or destroyed, the unstamped parts are admissible in evidence on proof of such loss or destruction (*b*).

Presentment for acceptance is not a negotiation (*c*). Compare the terms of the present Stamp Act, quoted

(*x*) Cf. *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. 849; and French Code, Art. 110; New York Negotiable Instruments Law, § 310.

(*y*) German Exchange Law, Art. 66; and cf. French Code, Art. 147.

(*z*) *Kearney v. West Grenada Co.* (1856), 26 L. J. Ex. 15. *Ratio decidendi* not clear.

(*a*) *Pinard v. Klockman* (1863), 32 L. J. Q. B. 82.

(*b*) 54 & 55 Vict. c. 39, s. 39 (Stamp Act, 1891), *post*, p. 402.

(*c*) Cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

above, with those of the repealed 17 & 18 Vict. c. 83, s. 6, § 71.
 which made it necessary for the holder to hold all the
 parts of a set.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills (*d*).

This is probably declaratory. It accords with the continental codes: see *Nouguier*, § 218; German Exchange Law, Art. 67.

The drawer signs all the parts of a set. An indorser sometimes signs all the parts that he holds, but not always. It has been said that an indorser is not bound to pay a dishonoured set, unless all the parts bearing his indorsement are delivered up to him or accounted for (*e*); but see sub-sect. (6). In America it has been held that in the case of an accepted bill it is sufficient if the accepted part be given up, and in the case of an unaccepted bill if the protested part be given up, there being no presumption that the missing parts have been improperly dealt with (*f*).

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true holder of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him (*g*).

Is the true owner entitled to get the remaining parts

(*d*) Cf. New York Negotiable Instruments Law, § 312.

(*e*) *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. at p. 854.

(*f*) *Downes v. Church* (1839), 13 Peters, 205, per Story, J.; 3 Kent, Com. 100.

(*g*) New York Negotiable Instruments Law, § 311.

§ 71.

from the person who in good faith has given value for them? There are *dicta* to this effect (*h*), but such a rule seems inconsistent with the rights given by sub-sect. (2).

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill (*i*).

By German Exchange Law, Art. 68, the person who forwards one part of a set for acceptance ought to indicate on the other parts where such part will be found. The person to whom the part has been forwarded for acceptance is bound to deliver it up to or according to the orders of the indorsee. This coincides with the practice in England.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof (*k*).

See "holder in due course" defined by sect. 29, *ante*.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by

(*h*) Cf. *Holdsworth v. Hunter* (1830), 10 B. & C. 449, at pp. 450, 454.

(*i*) Cf. *Ralli v. Dennistoun* (1851), 6 Exch. at p. 496; German Exchange Law, Art. 67; New York Negotiable Instruments Law, § 313.

(*k*) French Code, Art. 148; New York Negotiable Instruments Law, § 314.

payment or otherwise, the whole bill is dis- § 71.
charged (1).

“Copies” of a bill must be distinguished from the parts of a set. They are not often seen in England. The Act does not regulate them, and there is no case law on the subject. On the continent they are better known, and the practice concerning them is well summed up in Articles 66 and 67 of the Hague Uniform Regulation. They are as follows:—

“Art. 66. Every holder of a bill of exchange has the right to make copies of it. The copy must reproduce the original exactly, with the indorsements and all the other statements thereon. It must specify where the copy ends. It may be indorsed and guaranteed by ‘aval’ in the same manner and with the same effects as the original.”

“Art. 67. The copy must specify the person in possession of the original instrument. This person is bound to hand over the aforesaid instrument to the lawful holder of the copy. If he refuses the holder cannot exercise his rights of recourse against the persons who indorsed the copy until he has had a protest drawn up specifying that the original has not been given up to him on his demand.”

(1) New York Negotiable Instruments Law, § 315.

§ 72.

Conflict of Laws.

Rules where
laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:

Requisites in
form.

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made (*m*).

Provided that—

Stamp.

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue (*n*).
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as

(*m*) Cf. *Guepratte v. Young* (1851), 4 De G. & S. 217, at p. 228; *Story*, §§ 131—137; *Westlake's Private International Law*, ed. 5, § 228; *Dacey's Conflict of Laws*, ed. 2, p. 588; German Exchange Law, Art. 85; *Nouquier*, §§ 1417—1427. See “issue,” “acceptance,” and “indorsement” defined by sect. 2.

(*n*) Cf. *Westlake*, ed. 5, § 209.

between all persons who negotiate, hold, or become parties to it in the United Kingdom (o). § 72.

ILLUSTRATIONS.

1. By German law a bill need not express the value received. By French law it must. A bill drawn in Germany, but payable in Paris, which does not express the value received, is valid.

2. By the old law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid (p).

3. A bill drawn and payable in France expresses no value received, and is therefore invalid according to French law. If it is indorsed in England the indorser could be sued here (q), though the drawer could not.

4. Bill drawn in New York on Liverpool against consignment of cotton. Whether this is conditional in form or not is (it seems) a question to be determined by American law (r).

The contract is made where the delivery is effected, not where the signature is attached (s). A few foreign writers, among them Savigny, are of opinion that the maxim *Locus regit actum* is always facultative, never disabling. German Exchange Law, Art. 85, and the provisoes to this sub-section, go a long way towards adopting that view, but do not accept it in its entirety. In order to establish that a bill is invalid according to the law of the place of issue, the foreign law in point must be proved as a question of fact.

Before the Act, it had been held in some cases that English Courts were not concerned with the revenue laws Foreign stamp laws.

(o) See *Re Marseilles Co.* (1885), 30 Ch. D. 598. In that case, which arose on bills made before the Act, the bills were drawn in France by a Frenchman in French in English form (and indorsed in blank) on an English company who accepted them. Held, that as regarded the acceptor, they were to be treated as English bills, and that the French effect of an indorsement in blank as a mere procura-tion was immaterial. Cf. *Dicey*, ed. 2, p. 588.

(p) Cf. *Scudder v. Union Bank* (1875), 1 Otto, Sup. Ct. U. S. 406; which goes still further.

(q) Cf. *Wynne v. Jackson* (1826), 2 Russ. 351 and 634.

(r) *Guarantee Trust Co. of New York v. Hannay & Co.*, (1918) 2 K. B. 623, C. A.

(s) *Chapman v. Cottrell* (1865), 34 L. J. Ex. 186. Cf. *Bank of Montreal v. Exhibit and Trading Co.* (1906), 11 Com. Cas. 250. As to delivery, see sect. 21, and notes thereto.

§ 72.

of foreign countries (*t*). But the better opinion seemed to be that if a bill, for want of a stamp, was merely inadmissible in evidence according to the law of the place of its issue, it was admissible in evidence here if it conformed to the requirements of the English stamp laws relating to foreign bills; while, if the want of a stamp rendered it void at the place of issue, it was void everywhere (*u*). The Act appears to negative the latter branch of this principle, so far as it relates to bills which are negotiated or payable in a country different to that in which they were drawn.

Interpre-
tation.

(2) Subject to the provisions of this Act (*x*), the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made (*y*).

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom (*z*).

ILLUSTRATIONS.

1. An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognised. The title to the note passes by such delivery (*a*).

2. Action in England on a bill drawn in Belgium, and indorsed in blank in France. The effect of such indorsement is determined according to French law, *i.e.*, it operates as a "procuration" (*b*).

(*t*) *Wynne v. Jackson* (1826), 2 Russ. 351; *James v. Catherwood* (1823), 3 D. & R. 190.

(*u*) *Bristow v. Sequeville* (1850), 5 Exch. 275; cf. *Clegg v. Levy* (1812), 3 Camp. 166; *Story*, § 137.

(*x*) For the provisions referred to, see the remaining sub-sections, sect. 57 (damages), and, perhaps, sects. 15 (case of need) and 53 (funds in hands of drawee).

(*y*) *Allen v. Kemble* (1848), 6 Moore, P. C. 314; *Story* on Conflict of Laws, § 314; *Horne v. Rouquette* (1878), 3 Q. B. D. at p. 520, per Brett, L.J.; *Dicey* on Conflict of Laws, ed. 2, p. 592.

(*z*) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77.

(*a*) *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385.

(*b*) *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538, per Willes, J. These cases were overruled by *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 473, on the

3. A general acceptance given in Paris is to be interpreted according to French law (c).

§ 72.

4. Note made and payable in Scotland in the form "Pay to C.," without adding the words "or order." Before the Act such a note was negotiable by Scotch law, though not by English law, but it could be negotiated by indorsement in England (d).

5. A cheque drawn abroad on a London bank is stolen, and the indorsement of the first indorsee is forged. A Vienna bank cashes the cheque, and according to Austrian law acquires a good title thereto. The Vienna bank transmits the cheque to a London bank, who receive the amount from the bank on which it was drawn. The London bank is not guilty of conversion (e).

The term "interpretation," in this sub-section, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation (f).

Story, § 154, points out the reasons of the rule adopted in this sub-section. "It has sometimes been suggested," he says, "that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment, they agree upon due notice to reimburse the holder in principal and damages where they respectively entered into the contract."

The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Probably the maxim, *Contraxisse unusquisque in eo loco intelligitur in*

question of fact whether the indorsee could, according to French law, sue the holder in his own name, but the principle that the indorsement must be interpreted by French law was not questioned.

(c) Cf. *Don v. Lippmann* (1837), 5 Cl. & F. at pp. 12, 13, H. L.; *Story*, § 147.

(d) *Robertson v. Burdekin* (1843), 1 Ross, Scotch L. C. 824. See, now, sect. 8 (1) and (4), *ante*.

(e) *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677, C. A. *Qu.* whether the drawer could be sued on these facts if the cheque had been stopped? Cf. *Diccy's Conflict of Laws*, ed. 2, pp. 519, 522.

(f) Cf. *Westlake's Private International Law*, 5th ed. § 229; *Alcock v. Smith*, (1892) 1 Ch. at p. 256 (interpretation = legal effect); *Allen v. Kemble* (1848), 6 Moore, P. C. 314 (bill drawn in Demerara on Scotland, accepted payable in London—drawer discharged by *compensatio* according to Demerara law).

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Transfer
abroad.

Considera-
tion.

Measure of
damages.

quo ut solveret se obligavit, would apply (*g*). But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. *Nouguier*, § 1419.

Although *Embiricos v. Anglo-Austrian Bank* (Illustration 5) may be regarded as an application of sub-sect. (2), yet it undoubtedly goes further, and supplements the section by declaring that, *quoad* transfer in a foreign country, bills and notes must be regarded as chattels, and as subject to the ordinary rules which regulate the transfer of chattels. "The rule that the transfer of chattels must be governed by the law of the country in which the transfer takes place applies to a bill or cheque" (*h*). Sect. 72 is not exhaustive, and sect. 97 (2) saves common law when not inconsistent with the Act. The rules of private international law, as administered by our courts, are part of the common law.

Where a cheque is drawn by an Englishman in French territory on a bank in London it seems that the legality of the instrument must be determined by English law (*i*), although the validity of the consideration will be judged by French law (*k*).

The cases seem to regard the measure of damages on the breach of the contracts on a bill as resting on the same principles as the interpretation of those contracts (*l*); but it may be questioned whether the measure of damages comes within the meaning of the word "interpretation" in its present context in the Act. Subject to the positive

(*g*) *Robinson v. Bland* (1760), 2 Burr. 1077 (bill accepted in France payable in England); cf. *Moulis v. Owen*, (1907) 1 K. B. at pp. 754, 755, C. A. (cheque drawn in France on bank in London).

(*h*) *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. at p. 683, C. A.; following *Alcock v. Smith*, (1892) 1 Ch. 238, C. A. (bill taken in execution in Norway).

(*i*) *Moulis v. Owen*, (1907) 1 K. B. 746, C. A., Moulton, L.J., dissenting (cheque for money borrowed to pay losses at baccarat); discussed, *Dicey on Conflict of Laws*, ed. 2, pp. 532, 533; *Law Quarterly Review*, vol. 28, p. 127, by A. Cohen, K.C.

(*k*) *Saxby v. Fulton*, (1909) 2 K. B. 208, C. A. But if fraud or duress be involved, no action can be maintained in England, *Société des Hôtels Réunis v. Hawker* (1913), 29 T. L. R. 578 (cheque given in France on London under threat of prosecution).

(*l*) See the language of *Allen v. Kemble* (1848), 6 Moore, P. C. at pp. 321, 322.

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provisions of sect. 57, the rule with respect to damages appears to be that "the place at which each party to a bill or note undertakes that *he himself* will pay it, determines with regard to him the *lex loci contractus* according to which his liability is governed" (*m*). Thus, where a bill was drawn in California on Washington, and was dishonoured, it was held that damages against the drawer must be measured by Californian law, and that as part of those damages he must pay interest at the Californian rate (*n*); and it seems clear on principle that damages against an indorser should be measured by the law of the country where he indorsed the bill (*o*). Where a bill was accepted in Paris, payable in London, it was held that interest was payable according to the English and not according to the French rate (*p*).

So, again, when laws conflict, the validity and effect of a discharge is determined by the law of the place where the contract in question was made (*q*). For example:—

Discharge
when laws
conflict.

1. Bill accepted at Leghorn payable there. By the old law of Leghorn an acceptor could procure the cancellation of his acceptance if he had not at maturity received funds from the drawer. An acceptor so discharged at Leghorn cannot be sued in England (*r*).

2. Bill drawn in the United States (and issued there) on a person in England is dishonoured by non-acceptance. The drawer cannot be sued in England if he has been discharged in America under the bankruptcy law there in force (*s*).

3. Bill for 100*l.* drawn and issued in Demerara, but accepted and payable in England. At the time the bill matures the holder owes the acceptor 100*l.* According to

(*m*) *Mayne* on Damages, 4th ed. p. 234; *Story* on Conflict of Laws, § 315.

(*n*) *Gibbs v. Fremont* (1853), 9 Exch. 25; cf. *Ex parte Meredith* (1863), 32 L. J. Ch. 300.

(*o*) *Mayne* on Damages, 4th ed. p. 234; *Story* on Conflict of Laws, §§ 314, 315; but see the point regarded as open in *Gibbs v. Fremont*, *supra*.

(*p*) *Cooper v. Earl Waldegrave* (1840), 2 Beav. 282.

(*q*) Cf. *Ellis v. M'Henry* (1871), L. R. 6 C. P. at p. 234; *Story*, §§ 163—165.

(*r*) *Burrows v. Jemino* (1726), 2 Stra. 733; cf. *Gibbs v. Société des Métaux* (1890), 25 Q. B. D. at pp. 407, 408, C. A.

(*s*) *Potter v. Brown* (1804), 5 East, 124; cf. *Symons v. May* (1851), 6 Exch. 707.

§ 72. Demerara law this operates as a discharge of the bill (by *compensatio*). The drawer is discharged (*t*).

4. Accommodation bill drawn and issued in Austria, but accepted and payable in England, is dishonoured. The holder receives from the drawer in Austria a smaller sum in satisfaction of the bill. This, according to Austrian law, is a valid discharge. A subsequent indorsee cannot recover from the acceptor in England (*u*).

5. Bill drawn, accepted and payable in England. The acceptor is made bankrupt, and receives his discharge in Australia. He can be sued on the bill in England (*x*).

6. Action on a promissory note made in France. Plea that the suit was barred by the French law of prescription, which was five years. Held, that the French law in question was a law of procedure, and that the action could only be barred by the English Statute of Limitations (*y*).

Holder's
duties.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (*z*).

ILLUSTRATIONS.

1. Defendant indorsed to plaintiff in England a bill payable in Paris. Plaintiff indorsed to a Frenchman, who on dishonour protested it, and transmitted notice of protest to defendant in accordance with French law. Held that plaintiff could recover from defendant, though he had not given him notice of dishonour according to English law (*a*).

(*t*) *Allen v. Kemble* (1848), 6 Moore, P. C. 315; cf. *Wilkinson v. Simson* (1838), 2 Moore, P. C. 275. *Compensatio* is recognised as a discharge in all countries where civil law prevails. See further on that subject, *Nouguier*, §§ 1053—1060; French Code Civil, Arts. 289—299.

(*u*) *Ralli v. Dennistoun* (1851), 6 Exch. 483, 36th plea and judgment at p. 493.

(*x*) *Bartley v. Hodges* (1861), 30 L. J. Q. B. 352; *Story*, § 165; cf. *Gibbs v. Société des Métaux* (1890), 25 Q. B. D. 399, C. A.

(*y*) *Huber v. Steiner* (1835), 2 Bing. N. C. 202.

(*z*) *Story*, § 176; *Pardessus*, Arts. 1496—1499; *Pothier*, No. 57; *Dicey*, ed. 2, p. 595.

(*a*) *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340.

2. Bill drawn in England, payable in Spain, is indorsed in England by defendant to plaintiff. Plaintiff indorses it to D. in Spain. It is dishonoured by non-acceptance, and twelve days afterwards D. writes to give notice of this to plaintiff. Plaintiff at once gives notice to defendant. By Spanish law no notice of dishonour by non-acceptance is required. Plaintiff can recover from defendant (b).

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The sub-section is a further application of the maxim, *Locus regit actum* (c). See to the like effect German Exchange Law, Art. 86.

- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (d).

Amount expressed in foreign currency.

ILLUSTRATION.

Bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.

The amount of the bill for stamp purposes is necessarily calculated on a different principle: see Stamp Act, 1891, s. 6, *post*, p. 395.

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is

Due date.

(b) *Horne v. Rouquette* (1878), 3 Q. B. D. 511, C. A.; and cf. *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525 (effect of French moratorium).

(c) See a criticism on the language of the sub-section, *Westlake's International Law*, 3rd ed. §§ 231, 232. His suggestion that "act" includes "omission" is presumably correct.

(d) Cf. *Hirschfield v. Smith* (1866), L. R. 1 C. P. at p. 353; Belgian Code, Art. 33; *Dicey on Conflict of Laws*, ed. 2, p. 596. As to stipulations fixing rate of exchange, see sect. 9 (2), *ante*.

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determined according to the law of the place where it is payable.

ILLUSTRATIONS.

1. By English law days of grace are allowed on bills payable after date. By French law they are not. A bill drawn in Paris on London is entitled to three days' grace, but a bill drawn in London on Paris is not entitled to grace (*e*).

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law (*f*).

3. A bill accepted and payable in Germany is held by an English bank. War breaks out before the bill matures, and a German moratory law postpones payment indefinitely, and provides that interest shall not be payable for the period between the due date and the conclusion of the moratorium. The maturity of the bill depends on German law (*g*).

Where a bill is drawn in a country where the old style prevails, and is dated accordingly, there is no conflict of laws, but only a conflict of calendars. Thus if a bill be drawn in Petrograd on London bearing date 1st January, it must be dealt with in England as a bill dated 14th January; that is to say, the old style date must be translated into the Gregorian date (*h*). Russian bills payable after date in England usually bear both the eastern and western date, the maturity being calculated according to the western date.

Proof of
foreign law.

When a question arises as to the law of a foreign country, it must be proved as a fact in the case by the evidence of lawyers or other experts belonging to the country in question (*i*). In the absence of such evidence the foreign rule, it seems, is presumed to be the same as the English rule (*j*).

(*e*) *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525, at pp. 535—538; see the effect of the Bank Holiday Acts, discussed at p. 538.

(*f*) *Ibid.* So held also in Italy and at Geneva; see at p. 535. Cf. *Dicey*, ed. 2, p. 596.

(*g*) *Re Francke and Rasch*, (1918) 1 Ch. 470.

(*h*) For a table of corresponding dates, see *Whitaker's Almanac*.

(*i*) *Westlake's Priv. Int. Law*, 3rd ed. p. 364; *Concha v. Muriel* (1890), 40 Ch. D. 543, C. A.

(*j*) *The Parchim*, (1918) A. C. 157, P. C.

PART III.

CHEQUES ON A BANKER.

73. A cheque is a bill of exchange drawn on a banker payable on demand. Cheque defined.

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque (*k*).

ILLUSTRATIONS.

1. Instrument in the form of a cheque, ordering the bank to pay the sum mentioned “*provided* the receipt form at foot hereof is duly signed, stamped and dated.” This is not a cheque, as it is not an unconditional order to pay the money (*l*).

2. A. gives C. a cheque on a blank sheet of paper, writing on it the words “to be retained,” and promising him to substitute another cheque on a proper banker’s form. This he does not do. The cheque is a valid cheque, for it is an unconditional order to the banker, the words in question being only a direction to the payee (*m*).

See “bill of exchange” defined by sect. 3, *ante*, and “banker” by sect. 2. By sect. 10 a bill is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.

The Act is declaratory in so far as it defines a cheque

(*k*) New York Negotiable Instruments Law, § 321.

(*l*) *Bavins v. London & S. W. Bank*, (1900) 1 Q. B. 270, C. A.; cf. *Capital & Counties Bank v. Gordon*, (1903) A. C. at p. 252, per Lord Lindley. *Aliter*, where a note at the bottom of the cheque ran “the receipt at back hereof must be signed, &c.,” for this is a direction to the payee, not to the banker, *Nathan v. Ogden’s, Ltd.* (1905), 93 L. T. N. S. 126, C. A.; and cf. *Thairlwall v. Great Northern Railway*, (1910) 2 K. B. 509 (dividend warrant).

(*m*) *Roberts v. Marsh*, (1915) 1 K. B. 42, C. A.; cf. *Glen v. Semple* (1901), 3 F. 1134, Court of Session (cheque running “pay against cheque” or cash).

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as a bill of exchange (*n*). It is no part of the definition that a cheque should be an inland bill, or that it should be drawn by a *customer* upon his banker. Formerly cheques were exempt from stamp duty, but they were required to be issued within fifteen miles of the bank on which they were drawn. The enactments requiring this to be done have long been repealed (*o*).

By sect. 7 of the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59), coupons attached to stock certificates to bearer under that Act are to be deemed to be cheques on a banker for the purpose of any enactment relating to cheques, other than a stamp Act.

See cheques compared with and distinguished from ordinary bills of exchange by Parke, B. (*p*), Erle, J., and Byles, J. (*q*), Palles, C.B. (*r*), and the Supreme Court of the United States (*s*). All cheques are bills of exchange, but all bills of exchange are not cheques; therefore an authority to draw cheques does not necessarily include an authority to draw bills (*t*). Apart from statute, the distinctions between cheques and ordinary bills of exchange arise from the relationship of banker and customer subsisting between the drawer and drawee of a cheque. A cheque is intended for prompt presentment, while a note payable on demand is deemed to be a continuing security (*u*).

A cheque is not intended to be accepted, but at common law there is no objection to the acceptance of a cheque, if the holder likes to take it in lieu of payment, but the Bank Charter Acts would in many cases render this illegal. As to post-dated cheques, see note to sect. 13 (2), *ante*. As to when a cheque becomes stale, so as to be on

(*n*) *M'Lean v. Clydesdale Bank* (1883), 9 App. Cas. 95, per Lord Blackburn.

(*o*) *Ibid.* at p. 106.

(*p*) *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. at p. 69; cf. *Serle v. Norton* (1841), 2 Moo. & Rob. at p. 404.

(*q*) *Keane v. Beard* (1860), 8 C. B. N. S. at pp. 380, 381, as modified by *Hopkinson v. Forster* (1874), L. R. 19 Eq. at p. 76, Jessel, M.R.

(*r*) *Lynn v. Bell* (1876), 10 Ir. R. C. L. at p. 490.

(*s*) *Merchants' Bank v. State Bank* (1870), 10 Wallace, at p. 647.

(*t*) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163.

(*u*) *Brooks v. Mitchell* (1841), 9 M. & W. at p. 18, Parke, B.; *Chartered Bank v. Dickson* (1871), L. R. 3 P. C. at p. 579, Lord Cairns.

the footing of an overdue bill, see sect. 36 (3), *ante*. As to excuses for omitting to give notice of dishonour, see sect. 50 (2), especially clause (c), *ante*. An affidavit under Order XIV., verifying the cause of action, need not specifically allege that notice of the dishonour of a cheque has been given, or that it is excused (*x*), but this must be stated in the specially indorsed writ (*y*). As to cheques for less than twenty shillings in Scotland, see note to sect. 3, *ante*. As to forged indorsements on cheques, see sect. 60, *ante*.

Certified or Marked Cheques.—In Canada the practice of certifying cheques prevails; and in two appeals from Canada it has been held by the Privy Council that where a cheque is marked or certified by being initialled by the bank on which it is drawn, the marking operates as a representation that the bank, at the time of certifying, has funds of the drawer in its hands sufficient to meet payment of the cheque, but, at any rate in the absence of any specific usage, the marking appears to have no other effect (*z*). It is clearly not an acceptance that the holder can take advantage of: see sect. 17 (2), *ante*. As to certified cheques in the United States, see *Daniel*, §§ 1601—1611. Under §§ 323—325 of the New York Negotiable Instruments Law, the certification of a cheque is equivalent to an acceptance, but when procured by the holder, discharges the drawer and indorsers. It further operates as an assignment of funds.

In France, cheques are regulated by the “Loi du 23 Mai, 1865,” as modified by the “Loi du 19 Février, 1874,” and a law of 1911 authorised the crossing of cheques. The French law defines a cheque, as “L’écrit qui sous la forme d’un mandat de paiement sert au tireur à effectuer le retrait à son profit ou au profit d’un tiers de tout ou partie des fonds portés au crédit de son compte et disponible.” As to Italy, see Italian Com. Code, Arts. 339—344. Germany in 1908 passed a new law dealing

(*x*) *May v. Chidley*, (1894) 1 Q. B. 451.

(*x*) *Roberts v. Plant*, (1895) 1 Q. B. 597, C. A.

(*z*) *Gaden v. Newfoundland Savings Bank*, (1899) A. C. 281, P. C.; *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, P. C.; and cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at pp. 351, 352, per Cockburn, C.J., who says as regards England, “A custom has grown up among bankers themselves of marking cheques for the purpose of clearing, by which they become bound to one another.” See also *Paget on Banking*, ed. 2, pp. 88—94.

§ 73. with cheques (*a*). The continental codes do not require a cheque to be drawn on a banker, and in mercantile language foreign demand drafts are frequently referred to as cheques, though not drawn on a banker.

Presentment
of cheque for
payment.

74. Subject to the provisions of this Act (*b*)—
(1) Where a cheque is not presented for payment within a reasonable time (*c*) of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid (*d*).

Reasonable
time.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

Rights of
holder when
drawer is
discharged.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

(*a*) See an article in the Journal of the Society of Comparative Legislation for August, 1908, comparing the provisions of the new German law with English law. For an English translation, see Journal of Institute of Bankers, May, 1908.

(*b*) See sect 46, *ante*, as to excuses for non-presentment and delay in presentment.

(*c*) See *Wheeler v. Young* (1897), 13 Times L. R. 468, reasonable time a question of fact for jury.

(*d*) Cf. New York Negotiable Instruments Law, § 322.

This section alters the previous law. It was introduced in the Lords by Lord Bramwell to mitigate the rigour of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until at any rate six years had elapsed (*e*), and in this respect the common law appears to be unaltered. But if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, *e.g.*, by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound (*f*).

By virtue of sect. 45 (2), *ante*, the indorser of a cheque will be discharged, unless it is presented for payment within a reasonable time (after indorsement) as defined by the Act (*g*).

Sub-section (2), perhaps, introduces a new and less rigorous measure of reasonable time. The common law rule may be stated as follows:—

A cheque is deemed to have been presented within a reasonable time when presented according to the following rules:—

- (1.) If the person who receives a cheque and the banker on whom it is drawn are in the same place the cheque must, in the absence of special circumstances (*h*), be presented for payment on the day after it is received (*i*).
- (2.) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it (*k*).

(*e*) *Laws v. Rand* (1857), 27 L. J. C. P. 76; *Heywood v. Pickering* (1874), L. R. 9 Q. B. at p. 432; *Kinyon v. Stanton* (1878), 28 Amer. R. 601. As a reason for the six year limit, see *Pott v. Clegg* (1847), 16 M. & W. 321.

(*f*) *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; *Robinson v. Hawksford* (1846), 9 Q. B. 52; *Bailey v. Bodenham* (1864), 33 L. J. C. P. 252.

(*g*) Cf. *Smith v. Jones* (1838), 20 Wend. 192, New York. No English decision.

(*h*) *Firth v. Brooks* (1861), 4 L. T. N. S. 467.

(*i*) *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061.

(*k*) *Hare v. Henty* (1861), 30 L. J. C. P. 302; *Prideaux v. Criddle*

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(3.) In computing time non-business days must be excluded (*l*); and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is presumably excused (*m*).

The result of the cases seems to be this. A party who receives a cheque has a clear day for presenting or forwarding it. If, instead of presenting it himself, he forwards it to someone else to present, the question is, was he acting reasonably in so doing? A principal, of course, is responsible to third parties for the act of his agents; *e.g.*, if a person forwards a cheque to an agent, and the agent, instead of presenting it himself, unreasonably forwards it to another agent, the loss as regards third parties falls on the principal, though he may have a remedy over against his agent. The question whether a cheque has been presented within a reasonable time may arise between drawer and holder, or between indorser and indorsee, or between transferor by delivery and transferee (*n*), or between customer and banker (*o*). In each case it must be determined as between the particular parties. See a different standard of reasonable time as between vendor and vendee where the vendor of goods was paid by the cheque of the vendee's agent (*p*).

The effect of sub-section (3), read with sub-sect. (1), appears to be this:—

A person draws a cheque for 100*l.* on his banker, which is not presented for payment within a reasonable time of its issue as defined by the Act. The banker fails, the drawer having at the time of the failure sufficient money to his credit to meet the cheque. The drawer is discharged, but the holder can prove for 100*l.* against the banker's estate. If, however, the drawer had no funds to his credit, but was authorized to overdraw, the drawer would still be discharged; but the holder could not prove against the banker's estate.

(1869), L. R. 4 Q. B. 455; *Heywood v. Pickering* (1874), L. R. 9 Q. B. 428.

(*l*) Cf. 34 & 35 Vict. c. 17; and see sect. 92, *post*.

(*m*) Cf. *Alexander v. Burchfield* (1842), 7 M. & Gr. at p. 1067. Since this case the crossing of cheques has received legislative sanction.

(*n*) See, *e.g.*, *Moule v. Brown* (1838), 4 Bing. N. C. 266.

(*o*) See, *e.g.*, *Hare v. Henty* (1861), 30 L. J. C. P. 302.

(*p*) *Hopkins v. Ware* (1869), L. R. 4 Ex. 268.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by— **§ 75.**

Revocation
of banker's
authority.

- (1) Countermand of payment (*q*):
- (2) Notice of the customer's death (*r*).

ILLUSTRATIONS.

1. A. draws a cheque for 60*l.* in favour of C. The same day, after business hours, he telegraphs to his bank to stop the cheque. By an oversight of the clerks, the telegram is not brought to the manager's notice till two days later, and the cheque in the meantime has been paid. This is not an effective countermand, and the bank can debit A.'s account with the amount of the cheque (*s*).

2. A firm of two partners has a banking account. One of them dies. The authority of the surviving partner to draw cheques on the firm account is not (it seems) thereby determined (*t*).

3. One partner in a firm directs the banker not to pay a firm cheque. The banker (it seems) is justified in acting on this instruction (*u*).

A cheque given by the drawer in contemplation of death must be presented for payment by the donee before the drawer's death in order to entitle the donee to receive the amount out of the drawer's estate as a *donatio mortis causâ*. For example:—

*Donatio
mortis causâ.*

1. A. draws a cheque in favour of C., and in contemplation of death hands it to him as a gift. After A.'s death it is presented and payment refused. C. cannot claim for the amount against A.'s estate (*x*).

2. A., in contemplation of death, draws a cheque and gives it to C. After A.'s death C. presents the cheque, and the bankers, in ignorance of A.'s death, pay it. C.

(*q*) Cf. *Cohen v. Hale* (1878), 3 Q. B. D. 371; *M'Lean v. Clydesdale Bank* (1883), 9 App. Cas. 95.

(*r*) *Rogerson v. Ladbroke* (1822), 1 Bing. 93.

(*s*) *Curtice v. London City and Midland Bank*, (1908) 1 K. B. 293, C. A. As to paying a draft contrary to standing instructions, see *Twibell v. London Suburban Bank* (1869), W. N. p. 127.

(*t*) *Backhouse v. Charlton* (1878), 8 Ch. D. 444; see, too, *Usher v. Dauncey* (1814), 4 Camp. 97.

(*u*) *Linlley on Partnership*, ed. 8, p. 169.

(*x*) *Hewitt v. Kaye* (1868), L. R. 6 Eq. 198; *Beak v. Beak* (1872), L. R. 13 Eq. 489; cf. *Jones v. Lock* (1865), L. R. 1 Ch. 25.

§ 75. can (probably) retain the money as against A.'s representatives (*y*).

3. A., in contemplation of death, draws a cheque and gives it to C. Before A.'s death C. presents it for payment. The bankers refuse to pay it, because doubtful of A.'s signature. A. dies, and payment is subsequently refused on that ground. C., the donee, is entitled to receive the amount out of A.'s estate (*z*).

4. A., in contemplation of death, draws a cheque and gives it to C. Before A.'s death C. negotiates the cheque for value. The holder can claim for the amount against A.'s estate (*a*).

5. A., in contemplation of death, draws a cheque and gives it to C., who presents it for payment before A.'s death. A.'s account is overdrawn, but the banker refuses to pay the cheque because doubtful of the drawer's signature. C., the donee, is not entitled to receive the amount out of the drawer's estate (*b*).

The position of the donee of a cheque is this: he cannot successfully sue the drawer's executors on the instrument because he is not a holder for value (*ante*, p. 112), and the banker's authority to pay is revoked by notice of the drawer's death. A cheque given for value, it is conceived, is on the same footing as an ordinary bill of exchange. But, assuming that, as between drawer and payee, it is a mere authority to receive the amount, still an authority coupled with an interest is not revoked by death (*c*). Of course, if the donor, instead of giving his own cheque, gives the cheque of a third person, which he holds, the gift is good, and the difficulty adverted to above does not arise (*d*).

Bankruptcy.

The banker's authority to pay his customer's cheque is further revoked by the fact that a receiving order in bankruptcy has been made against him, or by notice that he has committed an available act of bankruptcy (*e*).

(*y*) Cf. *Tate v. Hilbert* (1793), 2 Ves. jun. at p. 118. The bankers are justified in paying.

(*z*) *Bromley v. Brunton* (1868), L. R. 6 Eq. 275.

(*a*) *Rolls v. Pearce* (1877), 5 Ch. D. 730.

(*b*) *Re Beaumont*, (1902) 1 Ch. 889.

(*c*) Cf. *Hatch v. Searles* (1854), 2 Sm. & G. at pp. 151, 155.

(*d*) *Clement v. Cheeseman* (1884), 27 Ch. D. 631, and *ante*, p. 151.

(*e*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45, and as to dealings with undischarged bankrupt, see sect. 49, and see available

A banker is under no obligation to honour his customer's cheques if he is served with a garnishee order, even though the balance to the customer's credit exceeds the amount of the judgment. If the banker honoured cheques subsequent to notice of the order, he would do so at his own risk, for it might turn out, for instance, that "a portion of the money in the banker's hands might be, without the banker's knowledge, money of which the judgment debtor was trustee. That portion could not be ordered to be paid to the judgment creditor" (f).

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Garnishee order.

The relations of banker and customer in respect of cheques may be summarized as follows:—

Relations of banker and customer.

(1.) In the absence of special contract, the relations between a banker and his customer are those of debtor and creditor; and in addition the customer is entitled to draw cheques on the banker to the extent of the sum for which he is a creditor (g). Hence the general rule that, in the case of a current account, the Statute of Limitations begins to run in favour of the banker from the last operation on the account (h).

The relation of banker and customer arises from contract, and the duties are reciprocal. The customer must use reasonable care in drawing his cheques, so as not to facilitate frauds on the banker, and if a cheque shows irregularity on the face of it the banker should refer to his customer before paying it (i). There is no fixed rule, but most banks decline to pay a cheque more than six months old without instructions from their customer.

act of bankruptcy defined by sect. 167; cf. *Vernon v. Hankey* (1787), 2 T. R. 113; and *Ex parte Sharp* (1844), 3 M. D. & D. 490, under former Bankruptcy Acts.

(f) *Rogers v. Whiteley* (1889), 23 Q. B. D. 236, C. A. (affirmed, (1892) A. C. 118, H. L.), see at p. 238, per Lindley, L.J. As to arrestment in Scotland, see *Bell's Principles*, 9th ed. § 308.

(g) Cf. *Pott v. Clegg* (1847), 16 M. & W. 321; *Foley v. Hill* (1848), 2 H. L. Ca. 28; *Ex p. Coe* (1861), 3 De G. F. & J. 335. See, too, *Re Hallett's Estate* (1880), 13 Ch. D. at pp. 727, 728, C. A.; *Re Agra Bank* (1866), 36 L. J. Ch. 151, banker is debtor to, not trustee for, his customer.

(h) *Pott v. Clegg* (1847), 16 M. & W. 321, but a different rule applies to a deposit account where the money can only be withdrawn on notice, *Atkinson v. Bradford Building Society* (1890), 25 Q. B. D. at p. 381, C. A.

(i) *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, see especially per Lords Shaw and Parmoor.

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(2.) Subject to the exceptions noted above, where a cheque is presented for payment and dishonoured, and the banker has in his hands at the time funds to the credit of his customer sufficient to meet it, the banker is liable to his customer in damages (*k*), unless the requisite funds were paid in so short a time before the dishonour of the cheque that the banker could not with the exercise of reasonable diligence have ascertained the state of accounts between them (*l*).

(3.) In the absence of special directions from the customer, it seems to be the duty of the banker to pay the customer's cheques in the order in which they are presented (*m*).

Branch
banks.

(4.) As regards banks having several branches, where a customer has an account at one branch, the other branches at which he has no account are not bound to honour his cheques (*n*); but where a customer has accounts at two or more branches the bank is entitled to combine such accounts against him (*o*).

The combined accounts must be kept in the same right; *e.g.*, a personal and a trust account cannot be combined.

(*k*) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744; *Gray v. Johnston* (1868), L. R. 3 H. L. 1, see at p. 14, per Lord Westbury; but see per Lord Cairns and *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903; cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 351, Ex. Ch. As to the measure of damages, see *ante*, p. 208. As to banker claiming a lien, see *Agra Bank v. Hoffmann* (1865), 34 L. J. Ch. 285. As to withdrawal of money paid into a bank by a principal who has given an agent authority to draw on it, see *Société Coloniale v. London and Brazilian Bank* (1911), 17 Com. Cas. 1, C. A. As to recovery by a third party of money paid in by mistake to a customer's overdrawn account, see *Kerrison v. Glyn, Mills & Co.* (1912), 81 L. J. K. B. 465, H. L.; 17 Com. Cas. 41, H. L.

(*l*) *Whitaker v. Bank of England* (1835), 1 C. M. & R. at pp. 749, 750, Parke, B.; cf. *Bransby v. East London Bank* (1866), 14 L. T. N. S. 403.

(*m*) *Kilsby v. Williams* (1822), 5 B. & Ald. 819; cf. *Boyd v. Emmerson* (1834), 2 A. & E. 184, at p. 202.

(*n*) *Woodland v. Fear* (1857), 7 E. & B. 519. So, too, a customer having a balance at one branch, cannot withdraw it on demand at another branch, though at his own cost he may apply to have it transferred, *Clare v. Dresdner Bank*, (1915) 2 K. B. 576, distinguishing *Leader v. Disconto Gesellschaft* (1914), 31 T. L. R. 83; cf. also *Leete v. Disconto Gesellschaft*, (1916) W. N. p. 13; 85 L. J. K. B. 281. Notice to stop a cheque at one branch is not notice to another branch: *London and South Western Bank v. Buszard* (1919), 35 T. L. R. 142.

(*o*) *Garnett v. M'Kewan* (1872), L. R. 8 Ex. 10.

See the whole status of branch banks in regard to bills discussed by the Privy Council (*p*). § 75.

In the absence of special agreement, express or implied, founded on consideration, a banker is of course under no obligation to let a customer overdraw (*q*). "Overdrawing a banking account is borrowing money" (*r*). Overdraft.

A cheque on payment becomes the property of the drawer (*s*), but the banker who pays it is entitled to keep it as a voucher until his account with his customer is settled (*t*). Property in paid cheque.

Entries made in customer's pass-book are *prima facie* evidence against the bank (*u*). Pass-book.

As the pass-book is made up by the banker it does not constitute a settled account. Hence if the drawer's signature to a cheque is forged the mere fact that he omits to examine his pass-book when returned to him, and does not discover that he has been debited with the amount, does not preclude him from recovering the sum so debited from his banker (*x*). On the other hand the banker may be bound by a mistaken entry. For example, a customer's

(*p*) *Prince v. Oriental Bank* (1878), 3 App. Cas. 325.

(*q*) *Cumming v. Shand* (1860), 29 L. J. Ex. at p. 132. As to implied agreement, see *Armfield v. London and Westminster Bank* (1883), 1 C. & E. 170; as to presumption, see *Ritchie v. Clydesdale Bank* (1886), 13 Sess. Cas. 114. As to the general duty of a bank not to disclose the state of a customer's account, except for good reasons, see *Hardy v. Veasey* (1868), L. R. 3 Ex. 107. As to consideration to support a promise to honour an overdraft, see *Fleming v. Bank of New Zealand*, (1900) A. C. 577, P. C.

(*r*) *Lindley on Partnership*, ed. 8, p. 169.

(*s*) *R. v. Watts* (1850), 2 Den. C. C. 15.

(*t*) Cf. *Charles v. Blackwell* (1877), 2 C. P. D. at p. 162, C. A. But when a banker pays a bill accepted payable at his bank, the practice is to return the cancelled bill to the customer on the following day.

(*u*) *Commercial Bank v. Rhind* (1848), 1 Macq. H. L. 643; *Couper's Trustees v. National Bank of Scotland* (1889), 16 Sess. Cas. 412; *Gaden v. Newfoundland Savings Bank*, (1899) A. C. at p. 286, P. C. As to appropriation of payment by entries in bank books not communicated to customer, see *Simson v. Ingham* (1823), 2 B. & C. 65; and as to such entries in pass-book, see at p. 73. See, too, *Hooper v. Keay* (1875), L. R. 1 Q. B. 178. As to facts which in the United States may preclude a customer from disputing errors in his pass-book, see *Leather Manufacturers' Bank v. Morgan* (1886), 117 U. S. Rep. 96 (Sup. Court of U. S.).

(*x*) *Walker v. Manchester and Liverpool District Bank* (1913), 108 L. T. N. S. 728, following *Kepitigalla Rubber Estates Co. v. National Bank of India*, (1909) 2 K. B. 1010.

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balance is £60, but it is entered as £70 by wrongly crediting an item of £10. If the customer in good faith draws a cheque for £65, and the bank dishonours it, the customer is entitled to substantial damages (*y*).

Lunatic
customer.

It seems on principle that the duty of a banker to pay his customer's cheques, and probably also his authority to pay them, may be determined by notice that the customer has become a lunatic (*z*).

Duty as to
bills.

When a customer accepts a bill payable at his bankers, it is an authority to the banker to pay it (*a*); but the banker is not bound to do so in the absence of special arrangement (*b*). In the case of a cheque he is protected against the consequences of a forged indorsement (sect. 60); in the case of a bill he is not (sect. 24). In the absence of special agreement a banker is clearly under no obligation to accept his customer's bills (*ante*, p. 207), nor it seems is he bound to pay a bill, other than a cheque, drawn on him by a customer (*ante*, p. 207); and it may be noted that a post-dated cheque, known to be such, is for some purposes regarded as a bill of exchange payable after date (*c*). If a banker is authorised by his customer to accept bills for him against "clean bills of lading," the banker is not responsible for the genuineness of the bills of lading, if they appear to be in order (*d*).

Moratoria.

In consequence of the financial disturbance caused by the outbreak of war in 1914, the Postponement of Payments Act, 1914 (4 & 5 Geo. 5, c. 11), was passed to authorise the issue of Royal proclamations, postponing the payment of bills and notes, and other obligations to such extent and subject to such conditions as the proclama-

(*y*) *Holland v. Manchester and Liverpool District Bank* (1909), 14 Com. Cas. 241.

(*z*) Cf. *Drew v. Nunn* (1879), 4 Q. B. D. 661, C. A. (agency); *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. 27, C. A. (continuing guarantee).

(*a*) *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218.

(*b*) Cf. *Roberts v. Tucker* (1851), 16 Q. B. at p. 579; *Bank of England v. Vagliano*, (1891) A. C. at p. 157, H. L. *Aliter*, perhaps, under § 147 of the New York Negotiable Instruments Law.

(*c*) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163; cf. *Emmanuel v. Roberts* (1868), 9 B. & S. 121. *Qu.* as to the banker's obligation since the objection to post-dated cheques was removed by the Stamp Act, 1870?

(*d*) *Ulster Bank v. Synnott* (1871), 5 Ir. R. Ch. 595; cf. *Guarantee Trust Co. of New York v. Hanney*, (1918) 2 K. B. 623, C. A.; 23 Com. Cas. 400, C. A.

tion might specify. In pursuance of this Act the proclamations of August 6, September 4, and September 30 were issued, and under them, on certain terms, the payment of debts was postponed till November 4 (e). As the result customers were relieved in general from paying their debts, but were debarred from drawing on their pre-moratorium balances during the currency of the moratorium. Bankers, of course, met their customers' convenience so far as they prudently could do so. The financial disturbance was so general that most other countries passed moratory laws. As to the recognition of foreign moratory laws in this country see notes to sect. 46, and sect. 72 (5).

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(e) Cf. Manual of Emergency Legislation, *tit.* Postponement of Payments; *Allen v. L. C. and Westminster Bank* (1915), 84 L. J. K. B. 1286 (overdraft); *Flack v. London and S. W. Bank* (1915), 31 T. L. R. 334 (dishonour of cheque); *J. and P. Coats & Co., Ltd. v. Disconto Gesellschaft* (1915), 31 T. L. R. 446 (interest on deposit notes).

§ 76.

Crossed Cheques.

General and
special cross-
ings defined.

76. (1) Where a cheque bears across its face an addition of—

(a) The words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable”; or

(b) Two parallel transverse lines simply, either with or without the words “not negotiable”; that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

By sect. 2, “banker” includes a body of persons, whether incorporated or not, who carry on the business of banking.

See the origin of crossing cheques explained by Parke, B. (f), and the common law effect of a crossing commented on by Lord Cairns (g). The first statute recognizing crossings was the 19 & 20 Vict. c. 25. This enactment was supplemented by the 21 & 22 Vict. c. 79, in consequence of a decision to the effect that the crossing was not an integral part of the cheque, and that its fraudulent

(f) *Bellamy v. Majoribanks* (1852), 7 Exch. 389, at p. 402. The practice originated in the Clearing House, and was afterwards adopted outside.

(g) *Smith v. Union Bank* (1875), 1 Q. B. D. at p. 33, C. A. It operated as a mere caution to the banker.

obliteration was not a forgery (*h*). Then came the case of *Smith v. Union Bank* (*i*). A cheque payable to bearer, and crossed to the London and County Bank, was stolen. It got into the hands of a holder in due course, who obtained payment through the London and Westminster Bank, notwithstanding the crossing. The Court held that the true owner had no remedy against the paying bankers, because the negotiability of the cheque was not affected by the crossing (*k*). To meet this difficulty, the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), was passed. That enactment introduced the "not negotiable" crossing, and gave a remedy to the true owner of a crossed cheque if it was paid contrary to the crossing (see now sects. 79 (2) and 81). It also repealed the previous statutes. The present Act repeals the Act of 1876, and, by sects. 76—82, reproduces its provisions with some slight modifications.

By sect. 95, the provisions of the Act as to crossed cheques apply to dividend warrants; and by the Revenue Act, 1883 (46 & 47 Vict. c. 55, s. 17), *post*, p. 392, they are further applied to "any document issued by a customer of any banker, and intended to enable any person to obtain payment from such banker of the sum mentioned in such document."

The English system of crossing cheques does not appear to have been adopted in the United States, and has only recently been adopted in one or two continental states, see, for instance, the French law of 1911.

77. (1) A cheque may be crossed generally or specially by the drawer.

Crossing by
drawer or
after issue.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

(4) Where a cheque is crossed generally or

(*h*) *Simmonds v. Taylor* (1858), 27 L. J. C. P. 248.

(*i*) *Smith v. Union Bank* (1875), 1 Q. B. D. 31, C. A.

(*k*) *Ibid.*

§ 77. specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection (*l*).

(6) Where an uncrossed cheque, or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

Sub-sect. (1) is new, but declaratory. Sect. 4 of the Act of 1876 in terms only authorized the "lawful holder" to cross a cheque. See now "holder" defined by sect. 2, *ante*. It includes an agent for collection (*m*).

Sub-sect. (6) is new. It may protect the banker from possible frauds by his clerks. Where an uncrossed cheque is paid into a bank for collection and the banker crosses it, the cheque does not thereby become a crossed cheque within the meaning of sect. 82 (*n*). As to the effect of crossing by a stranger, see *Paget on Banking*, ed. 2, p. 77.

Crossing a material part of cheque.

78. A crossing authorized by this Act is a material part of the cheque: it shall not be lawful for any person to obliterate, or, except as authorized by this Act, to add to or alter the crossing.

As to the effect of material alterations generally, see sect. 64, *ante*. If a crossing is fraudulently altered or obliterated it is a forgery: see sect. 1 of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

The drawer of a cheque sometimes strikes out a crossing at the request of the payee, and writes "Pay cash" on it. The Act does not sanction this practice; but it is difficult

(*l*) The words "to another banker for collection" have been substituted for the words "to another banker, his agent for collection."

(*m*) *Akroerri Mines v. Economic Bank*, (1904) 2 K. B. at p. 472; 9 Com. Cas. at p. 288.

(*n*) *Capital and Counties Bank v. Gordon*, (1903) A. C. 240.

to see who in such case could have any effective remedy. In an unreported case it was held that where the indorser of a cheque crossed it, and at the request of the indorsee altered the crossing, the indorser could not set up that the cheque was avoided by the alteration. See also note to sect. 76. Where a cheque was paid in to the E. Bank for collection, and they indorsed it specially to F. & Co., their clearing-house bankers, adding the words "Account E. Bank," it was held that this was not an addition to the crossing, but only a direction to the receiving bank as to how the money was to be dealt with after receipt (o).

79. (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof. Duties of banker as to crossed cheque.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same (p), or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as autho-

(o) *Akrokerri Mines v. Economic Bank*, (1904) 2 K. B. at p. 472; 9 Com. Cas. at p. 288. As to the effect of the marking "a/c payee," see *post*, p. 305.

(p) If a cheque is paid into a bank, and the bank gives its own cheque in exchange, the cheque is paid within the meaning of this section: *Meyer & Co., Ltd. v. Sze Hai Tong Banking Co.*, (1913) A. C. 847, P. C.

§ 79. rized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker as the case may be.

This section reproduces sects. 8, 10, and 11 of the Act of 1876. As there is no privity between the holder and drawee of a cheque, a banker incurs no liability to the *holder* by refusing to pay a crossed cheque. His only liability is to his customer, the drawer.

In a case before the Act of 1876 a crossed cheque payable to order was stolen from the payee. His indorsement was forged, and the cheque was paid in contravention of the crossing to a person who gave value in good faith. The drawer gave the payee another cheque. On these facts it was held (1) that the banker had no right to debit the drawer's account with the cheque, (2) that the payee who lost the cheque might have recovered the amount from the person who received the money for it, but (3) that the drawer, having allowed his account to be debited with the cheque, might himself recover the amount from the person who got the cash for it (*q*). The Act does not appear to affect this decision, but it gives an additional remedy against the bankers to the true owner, who, in the case referred to, would have been the payee. If the cheque had been payable to bearer, or had been indorsed in blank by the payee before it was stolen, and had got into the hands of a *bonâ fide* holder for value, there would, it seems, be no remedy (*r*), unless the cheque was crossed "not negotiable."

(*q*) *Bobbett v. Pinkett* (1876), 1 Ex. D. 368, at p. 372.

(*r*) *Smith v. Union Bank* (1875), 1 Q. B. D. 31, C. A. Is not the "holder in due course" the "true owner"? Cf. *Paget on Banking*, ed. 2, p. 80.

80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

§ 79.

Protection to
banker and
drawer where
cheque is
crossed.

This reproduces sect. 9 of the Act of 1876. If the cheque were payable to order, and the indorsement has been forged, the drawer or, as the case may be, the payee can recover the amount from the person who received payment of the cheque, if he can find him (s).

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Effect of "not
negotiable"
crossing on
holder.

This reproduces the first part of sect. 12 of the Act of 1876. A cheque crossed "not negotiable" is still transferable, but its negotiable quality is limited. It is put on much the same footing as an overdue bill. A holder who has a good title can still transfer it, and the transferee is entitled to receive payment; but where the title of the transferor is defective a subsequent holder for value is deprived of the protection ordinarily afforded to a holder in due course. Suppose a cheque payable to bearer and crossed "not negotiable" is stolen. The thief gets a tradesman to cash it for him, and the tradesman

(s) *Ogden v. Benas* (1874), L. R. 9 C. P. 513; cf. *Patent Safety Gun Cotton Co. v. Wilson* (1880), 42 L. J. C. P. 713, C. A.

§ 81. gets the cheque paid on presentment through a banker. The banker who pays and the banker who receives the money for the tradesman are protected, but the tradesman would be liable to refund the money to the true owner, and, assuming payment of the cheque to have been stopped, he could not sue the drawer. So, too, where a cheque crossed "not negotiable" was drawn in favour of a firm, and one of the partners in fraud of his co-partner indorsed the cheque to the defendant, who cashed it, it was held that the other partner who, under the terms of the partnership agreement, was entitled to the cheque could recover the amount from the defendant (*t*).

Protection to
collecting
banker.

[Cf. 6 Edw. 7,
c. 17, s. 1.]

82. Where a banker in good faith and without negligence(*u*) receives payment for a customer of a cheque crossed generally or specially to himself(*x*), and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

ILLUSTRATIONS.

1. A thief steals a crossed cheque payable to order, and inserts his own name in the place of the indorsee's. He then takes it to a Paris bank (where he has no account) to collect for him, and they collect it through their London agents. The indorsee can recover the amount from the Paris bank (*y*).

2. C., having obtained by fraud a cheque which is crossed "& Co., not negotiable," takes it to a bank, who cash it for him. He has no account at that bank, but for many years they have

(*t*) *Fisher v. Roberts* (1890), Times L. R. p. 354, C. A. See the section incidentally discussed in *National Bank v. Silke*, (1891) 1 Q. B. 435, C. A.; and by Lord Brampton in *G. W. Railway v. London and County Bank*, (1901) A. C. 414, H. L.

(*u*) See *Hannan's Lake View v. Armstrong & Co.* (1900), 5 Com. Cas. 188; *Bavins v. London and South Western Bank*, (1900) 1 Q. B. 270, at p. 272; *Ross v. L. C. and Westminster Bank*, (1919) 1 K. B. 678 (cheque payable to a public department, indorsed and paid in to a private account).

(*x*) It must be crossed before it reaches his hands, *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, H. L.

(*y*) *Kleinwort v. Comptoir d'Escompte*, (1894) 2 Q. B. 156, followed *Lacave v. Crédit Lyonnais*, (1897) 1 Q. B. 148; *Matthews v. Brown & Co.* (1894), 63 L. J. Q. B. 494.

been in the habit of cashing cheques for him. C. is not a customer of the bank, and they are not protected by the section in obtaining payment of the cheque (z).

3. A bank carries on business in London and Paris. A crossed cheque payable to order is drawn on the London branch in favour of C. in Paris. It is stolen from him, and his indorsement is forged. In France the crossing of cheques is not recognized, and the Paris branch cash the cheque for F., who appears to be the last indorsee, though he has no account there, and remit it to London. C., the true owner, can maintain an action against the bank for the conversion of the cheque. The section does not protect them (a).

4. A. draws a crossed cheque in favour of C., and puts it in the pillar-box. It is stolen therefrom, and gets into the hands of X., who personates C., forges his signature, and opens an account with a banker by means of the stolen cheque. The banker makes no inquiry as to X.'s position or character. If the banker collects the cheque for X.'s account he is not protected (b).

5. A., who is the manager of an insurance broker's business, has authority to draw cheques "per pro." for the purposes of that business. He fraudulently draws a series of cheques "per pro." and pays them in to his own banking account. If his banker collects them without inquiry he is guilty of negligence and is not protected by this section (c).

6. Crossed cheque drawn payable to "T. C. and others, or bearer, a/c payee." T. C. and others are trustees of a fund. The cheque is sent to the solicitor to the trust, who fraudulently pays it in to his own account at the X. bank, where the trustees have no account. If the X. bank collects the cheque it is guilty of negligence and liable to the trustees for the conversion of the cheque (d).

Sect. 82 reproduces as an independent section the proviso to sect. 12 of the Act of 1876 (cheques crossed "not negotiable" (e)). The section is amended or explained by sect. 1 of the Bills of Exchange (Crossed Cheques) Act,

(z) *Great Western Railway v. London and County Bank*, (1901) A. C. 414, H. L.

(a) *Lacave v. Crédit Lyonnais*, (1897) 1 Q. B. 148. In 1911 a law was passed in France authorising the crossing of cheques.

(b) *Ladbroke & Co. v. Todd* (1914), 19 Com. Cas. 256.

(c) *Morison v. Lond. County and Westminster Bank*, (1914) 3 K. B. 356, at p. 368, C. A. But on the facts subsequent to this transaction it was held that the employer had ratified the action of the manager.

(d) *House Property Co. v. Lond. County and Westminster Bank* (1915), 84 L. J. K. B. 1846.

(e) This gives effect to *Mathiessen v. London and County Bank* (1879), 5 C. P. D. 7, where it was argued that the proviso only applied to cheques crossed "not negotiable," but it was held to apply to all crossed cheques.

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1906 (6 Edw. 7, c. 17), *post*, p. 409, which enacts that a banker receives payment of a crossed cheque for a customer within the meaning of sect. 82, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Customer.

A person becomes a customer of a bank as soon as the bank opens an account with him on which he can draw (*f*).

Where a customer pays in to his banker the cheque of a third party, the usual practice is for the banker at once to credit the customer's account with the amount of the cheque, and then, if the cheque is dishonoured, to debit his account with the amount thereof. But, as soon as the banker credits his customer's account, he becomes a holder for value of the cheque, whether crossed or not, and, that being so, it was held by the House of Lords that he was receiving payment of the cheque (if paid) on his own account and not on behalf of the customer. He, therefore, was not protected by sect. 82 if his customer's title was defective (*g*). As a result, the only safe course for the banker would have been to put every cheque paid in by a customer to a suspense account until it was cleared. To obviate this very inconvenient method of dealing, the Bills of Exchange (Crossed Cheques) Act, 1906, *post*, p. 409, was passed, and the banker is now protected notwithstanding that he credits his customer's account with the amount of a crossed cheque before he receives payment thereof.

"Not negotiable"
cheques.

The mere fact that a cheque is crossed "not negotiable" does not put the collecting banker on inquiry as to the title of the person who paid it in (*h*).

Per pro.
cheques.

Sect. 25 (procuration signatures) relates only to liabilities on the instrument, and does not apply to collecting bankers; but in determining whether the banker is or is not guilty of negligence the fact that a cheque is drawn or indorsed "per pro." is always an element to be taken into consideration in connection with the other circumstances of the case (*i*).

(*f*) *Ladbroke v. Todd* (1914), 19 Com. Cas. 256, at p. 261; cf. *Great Western Railway v. London and County Bank*, (1901) A. C. 414, H. L.

(*g*) *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, H. L.; affirming *ibid.*, (1902) 1 K. B. 242, C. A.

(*h*) *Crumplin v. London Joint Stock Bank* (1913), 19 Com. Cas. 69.

(*i*) *Morison v. London County and Westminster Bank*, (1914), 3

Of recent years the practice has sprung up of marking cheques with the words "account payee." This is not an addition to the crossing, but is a direction to the collecting banker that the proceeds of the cheque when collected are to be placed to the credit of the payee specified in the cheque (*k*). It has further been held (1) that the marking "a/c payee" does not restrict the negotiability of the cheque (*l*), and (2) that a cheque drawn payable to "J. C. and others or bearer a/c payee" is not payable to bearer, but should be credited to the account of "J. C. and others" (illustration 6). If, then, the collecting banker pays a cheque marked "a/c payee" otherwise than to that account, he does so at his own risk, but presumably if he does not keep the payee's account he may refuse to handle the cheque. It is said that uncrossed cheques are sometimes marked "a/c payee," but the liability of the paying banker in that case has not been decided. The status of these cheques requires reconsideration.

In Germany and the countries which follow German law crossing is not recognised, but cheques may be marked "nur zur verrechnung."

K. B. 356, 368, C. A.; cf. *Bissell v. Fox & Co.* (1884), 51 L. T. N. S. 663; *Crumplin v. London Joint Stock Bank* (1913), 19 Com. Cas. 69; as to paying banker, see *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A.

(*k*) *Morison v. Lond. County and Westminster Bank*, (1914) 3 K. B. at p. 373, C. A.

(*l*) *National Bank v. Silke*, (1891) 1 Q. B. 435, C. A.

§ 83.

PART IV.

PROMISSORY NOTES.

Promissory
note defined.

83. (1) A promissory note is an unconditional (*m*) promise in writing made by one person to another (*n*) signed by the maker (*o*), engaging to pay, on demand (*p*) or at a fixed or determinable future time (*q*), a sum certain (*r*) in money (*s*), to, or to the order of, a specified person (*t*) or to bearer (*u*).

ILLUSTRATIONS.

1. An I. O. U. containing a promise to pay may constitute a note (*x*).

2. A promissory note containing the clause, "No time given to, or security from, or composition entered into with, either party, shall prejudice the rights of the holder to proceed against any other party," is a valid promissory note (*y*).

The following are invalid as notes:

3. "Borrowed of C. 100*l.* to account for on behalf of the X. Club at — months' notice, if required." (Signed) T. B. (*z*).

(*m*) *Colehan v. Cooke* (1742), Willes, 393, at pp. 396, 397. Cf. sect. 3 (1) and note thereto, *ante*.

(*n*) See *Beecham v. Smith* (1858), E. B. & E. 442, and sub-sect. (2).

(*o*) As to signature by the hands of an agent, see sect. 91 (1), *post*, and as to the seal of a corporation in lieu of signature, see sect. 91 (2), *post*.

(*p*) As to what instruments are, in legal effect, payable on demand, see sect. 10, *ante*.

(*q*) *Colehan v. Cooke* (1742), Willes, 393, at pp. 396, 397; see sect. 11, and notes thereto, *ante*.

(*r*) See sect. 9, and notes thereto, *ante*.

(*s*) See sect. 3 (1), and note thereto, *ante*.

(*t*) See sect. 8, and notes thereto, *ante*.

(*u*) Cf. New York Negotiable Instruments Law, § 320, which, however, is confined to negotiable notes.

(*x*) *Brooks v. Elkins* (1836), 2 M. & W. 74.

(*y*) *Kirkwood v. Carroll*, (1903) 1 K. B. 531, C. A.

(*z*) *White v. North* (1849), 3 Exch. 689.

4. "I. O. U. 20*l.* for value received." (Signed) W. B. (*a*).
5. "Nine years after date I promise to pay C. 100*l.*, provided X. shall not return to England, or his death be certified in the meantime." (Signed) W. B. (*b*).

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Comparing this section with the wider terms of sect. 33 of the Stamp Act, 1891, *post*, p. 398, it is clear that many instruments may require to be stamped as promissory notes which have not the mercantile incidents of notes as prescribed by the Act. A promissory note issued in the United Kingdom must be on an impressed stamp: see *post*, p. 400. An instrument invalid as a note may, of course, be valid as an agreement (*c*). See a promissory note compared with a bill of exchange by Lord Mansfield (*d*) and Parke, B. (*e*). By sect. 89, *post*, the provisions of the Act relating to bills of exchange apply, with certain modifications, to promissory notes.

No form of words is essential to the validity of a note, provided the requirements of this section be fulfilled (*f*): but, on the other hand, a document might comply with the terms of the section and yet not be a promissory note. It must be such as to show the intention to make a note (*g*). For instance, a banker's deposit note running, "Received of Mr. C. 150*l.* to be accounted for on demand," and signed, will not be treated as a promissory note (*h*).

Form of words.

An instrument promising to do anything in addition to the payment of money is clearly not a note (*i*), but it has been held in the United States that a promissory

Note in alternative.

(*a*) *Gould v. Coombs* (1845), 1 C. B. 543.

(*b*) *Morgan v. Jones* (1830), 1 C. & J. 162.

(*c*) Cf. *White v. North* (1849), 3 Exch. 689; *Drury v. Macaulay* (1846), 16 M. & W. 146; *Kirkwood v. Smith*, (1896) W. N. 46 (16); *Balch v. Pilcher* (1909), 25 T. L. R. 497; *Provincial Bank of Ireland v. Fisher* (1918), 2 Ir. R. 521, C. A.

(*d*) *Heylyn v. Adamson* (1758), 2 Burr. at p. 676.

(*e*) *Gibb v. Mather* (1832), 2 Cr. & J. at pp. 262, 263, Ex. Ch.

(*f*) *Hooper v. Williams* (1848), 2 Exch. at p. 20. See English and American cases reviewed in *Currier v. Lockwood* (1873), 16 Amer. R. 40. So, too, an ambiguous instrument may be treated by holder either as a bill or a note at his option. *Peto v. Reynolds* (1854), 9 Exch. 410; affirmed, 11 Exch. 418, Ex. Ch.

(*g*) *Sibree v. Tripp* (1846), 15 M. & W. at p. 29; cf. *Jackson v. Slipper* (1869), 19 L. T. N. S. 640.

(*h*) *Hopkins v. Abbott* (1875), L. R. 19 Eq. 222.

(*i*) Sect. 3 (2), *ante*; and *Follett v. Moore* (1849), 4 Exch. 410, at p. 416; cf. *Cook v. Satterlee* (1826), 6 Cowen, 108, New York.

§ 83. note may give the holder the option between the payment of the sum specified and the performance of some other act by the makers, though as to the latter it is not a note (*k*). As the holder can demand money, and no option is given to the maker, it is said there is no uncertainty in the instrument. Thus, in New York, an instrument running, "I promise to pay C. or order 100 dollars or in goods on demand," was held to be a valid note (*l*). This question does not appear to have been raised here.

Note to bearer
under 20*l*. *

In England a promissory note for less than 20*l*. payable to bearer on demand must, by the Bank Notes Act, 1826 (7 Geo. 4, c. 6, s. 10), be made payable where issued, but may also be payable elsewhere.

Note to bearer
under 5*l*.

A promissory note for less than 5*l*. payable to bearer on demand is, it seems, void in England. The legislation on the subject is confused, but this seems to be the effect of it. The 48 Geo. 3, c. 88 (now repealed), made negotiable notes under twenty shillings void. The 17 Geo. 3, c. 30, required negotiable notes for more than twenty shillings and less than 5*l*. (or on which less than 5*l*. was unpaid), to specify the payee and conform to other regulations. This Act was suspended by the Promissory Notes Act, 1863 (26 & 27 Vict. c. 105), as to any note "not being a note payable to bearer on demand." The suspension was continued annually till 1882, when the Act was repealed by the Bills of Exchange Act. The 7 Geo. 4, c. 6, ss. 3, 5, and 7, appear to prohibit the making or issue in England of any promissory note payable to bearer on demand for less than 5*l*. The Bank Notes (No. 2) Act, 1828 (9 Geo. 4, c. 65), prohibits the issue or negotiation in England of any note for less than 5*l*. payable to bearer on demand which is made or issued, or purports to be made or issued, "in Scotland or Ireland, or elsewhere out of England." As to Scottish bank notes, see further, 5 Geo. 3, c. 49.

Loan society
notes.

Promissory notes given to registered loan societies are regulated by sects. 13 to 26 of the Loan Societies Act, 1840 (3 & 4 Vict. c. 110).

(*k*) Cf. *Dinsmore v. Duncan* (1874), 57 New York R. 573; cf. New York Negotiable Instruments Law, § 24 (4).

(*l*) *Hostater v. Wilson* (1862), 31 Barb. 307.

A bank note may be defined as a promissory note issued by a banker payable to bearer on demand. But a bank note differs from an ordinary note in various important respects. Among others it may be re-issued after payment. See further distinctions pointed out by Bramwell, B. (*m*). As to the restrictions on the issue in England of bank notes by bankers other than the Bank of England, see *ante*, p. 74. Bank of England notes form part of the ordinary currency of the kingdom, and therefore stand on a peculiar footing (*n*). The statutory privileges of the Bank of England are expressly saved by sect. 97 (3), *post*.

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Bank notes.

As to the nature of a bank post bill, see *Forbes v. Marshall* (*o*). Bank post bills.

An I. O. U. is not a negotiable instrument, and requires no stamp. The production by the plaintiff of an I. O. U. signed by the defendant, though not addressed to anyone by name, is evidence of an account stated between the parties, but not of money lent (*p*). As to Scotland, see *Bell's Principles*, 9th ed. § 310. I. O. U.

The French law as to notes (*billets à ordre*) is contained in Arts. 187, 188 of the Code de Commerce. Although the code is silent on the point, it seems that notes payable to bearer (*billets au porteur*) are to some degree recognized: *Nouguier*, §§ 1565—1578. German Exchange Law, Arts. 96—100, and Netherlands Code, Arts. 208, 209, deal with notes. The foreign codes, like this Act, apply to notes, *mutatis mutandis*, the provisions relating to bills of exchange. Foreign laws

(*m*) *Lichfield Union v. Greene* (1857), 26 L. J. Ex. at p. 142.

(*n*) See per Ld. Mansfield, in *Miller v. Race* (1758), 1 Burr. 452; 1 Smith, L. C. ed. 12, p. 525; and per Jessel, M.R., in *Suffell v. Bank of England* (1882), 9 Q. B. D. at p. 563, C. A., and see also *ante*, p. 11.

(*o*) *Forbes v. Marshall* (1835), 24 L. J. Ex. 305; cf. *Willis v. Bank of England* (1835), 4 A. & E. 21; and *Hart on Banking*, ed. 3, p. 604, and 5 Geo. 3, c. 49.

(*p*) *Taylor on Evidence*, § 124; *Fesenmayer v. Adcock* (1847), 16 M. & W. 449. As to contradicting such evidence, see *Lemere v. Elliott* (1861), 30 L. J. Ex. 350; cf. *Quarrier v. Colston* (1842), 1 Phillips, 147 (money lent for gambling in Germany); *German v. Yates* (1915), 32 T. L. R. 52 (assignment by surrender and giving I. O. U. to a different person).

§ 83.

Note payable
to maker's
order.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

ILLUSTRATIONS.

1. B. makes a note payable to his own order, and indorses it in blank. This is a valid note payable to bearer (*q*).

2. B. makes a note payable to his own order, and indorses it to C. This is a valid note payable to C. or order (*r*).

3. B., C. and D. made a joint and several note payable to C. and D. or order. This is a valid note. C. and D. may sue B. on his several liability (*s*).

4. B. & Co. make a note payable to C. & Co. or order. X. is a partner in both firms. C. & Co. could not, before the Judicature Acts, sue B. & Co. on this note. But if C. & Co. indorsed the note, the indorsee could sue (*t*).

See sect. 61, *ante*, as to coincidence of right and liability at maturity. An action between a partner and the firm, or between two firms having a common member, was impossible at common law, but such suits are now provided for by R. S. C. Ord. XLVIII. r. 10. In Scotland a firm has always been recognized as an artificial person.

Note contain-
ing pledge of
collateral
security.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof (*u*).

Would the right to the security pass with the instrument? The question has been touched upon, but not decided (*x*). In France the security follows the instrument: *Nouguier*, § 715. The Belgian Code de Commerce, § 26, expressly enacts the same as to bills.

(*q*) *Hooper v. Williams* (1848), 2 Exch. 13; *Masters v. Baretto* (1849), 8 C. B. 433; *Stevenson v. Brown* (1902), 18 T. L. R. 268.

(*r*) *Gay v. Lander* (1848), 17 L. J. C. P. 286.

(*s*) *Beecham v. Smith* (1858), E. B. & E. 442.

(*t*) *Lindley*, 3rd ed. p. 219; cf. *Neale v. Turton* (1827), 4 Bing. 149.

(*u*) *Wise v. Charlton* (1836), 4 A. & E. 786; cf. *Towne v. Rice* (1877), 122 Massachus. R. 67; cf. New York Negotiable Instruments Law, § 24, and notes in *Crawford's* edition.

(*x*) *Storm v. Stirling* (1854), 3 E. & B. 832.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

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This reproduces with a modification the effect of the repealed 19 & 20 Vict. c. 97, s. 7. See sect. 4, *ante*, and note thereto, where the term "British Islands" is defined and the subject is discussed. By sect. 89 (4), *post*, when a foreign note is dishonoured protest thereof is unnecessary, but for the purpose of charging a foreign party in his own country it is prudent to protest it.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (*y*).

Delivery
necessary.

By sect. 2, delivery means transfer of possession, actual or constructive, from one person to another. As to the conditions of a valid delivery, see sect. 21, *ante*.

85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor (*z*).

Joint and
several notes.

The acceptors of a bill can only be liable jointly, not jointly and severally. A new maker cannot be added to a joint and several note after its issue (*a*), and there cannot be a series of makers liable severally, and not jointly and severally. Nor can two makers be liable in the alternative (*b*). But where an infant and his father make a joint and several note for money advanced to the infant, the infant is not liable, but the father is liable as the principal debtor (*c*).

(*y*) *Chapman v. Cottrell* (1865), 34 L. J. Ex. 186.

(*z*) Cf. *Ex parte Honey* (1871), L. R. 7 Ch. 178.

(*a*) *Gardner v. Walsh* (1855), 5 E. & B. 83.

(*b*) *Ferris v. Bond* (1821), 4 B. & Ald. 679.

(*c*) *Wauthier v. Wilson* (1912), 28 T. L. R. 239, C. A.

§ 85. A partner, as such, cannot bind his co-partners severally, but by a joint and several note he may bind the firm jointly (*d*) and himself severally (*e*).

Judgment, without satisfaction, against one of the makers of a joint note is a bar to proceedings against the other maker (*f*); not so if the note be joint and several (*g*). Payment or satisfaction by one of the makers of a joint and several note discharges it (*h*), but where partners are jointly and severally liable on a note a composition in bankruptcy as regards the joint estate does not get rid of the several liability (*i*).

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note (*k*).

Conversely a note which runs, "We promise to pay," and is signed by two or more persons, is deemed to be a joint note only (*l*).

In a case where B., X., and Y. were partners, and B. made a note running, "I promise to pay," but signed it "for X. and Y.—J. B.," it was held that this was the joint note of the firm (*m*).

Perhaps if a note runs, "I, John Brown, promise to pay," and it is signed by Smith as well as Brown, Smith would only be liable as an indorser under sect. 56, and not as a co-maker.

Note payable
on demand.

86. (1) Where a note payable on demand has been indorsed, it must be presented for payment

(*d*) *MacLae v. Sutherland* (1854), 3 E. & B. 1.

(*e*) *Penkivil v. Connell* (1850), 5 Exch. 381.

(*f*) *King v. Hoare* (1844), 13 M. & W. 494; *Kendall v. Hamilton* (1879), 4 App. Cas. 504.

(*g*) *Ibid.*; and *Re Davison* (1884), 13 Q. B. D. at p. 53; cf. *Wegg Prosser v. Evans*, (1898), 1 Q. B. 108, C. A.

(*h*) *Nicholson v. Revill* (1836), 4 A. & E. 675; *Beaumont v. Greathead* (1846), 2 C. B. 494; *Thorne v. Smith* (1851), 20 L. J. C. P. 71.

(*i*) *Simpson v. Henning* (1875), L. R. 10 Q. B. 406.

(*k*) *Monson v. Drakeley* (1873), 16 Amer. R. 74; cf. *Ridd v. Moggridge* (1857), 2 H. & N. 568, *dub.* Pollock, C.B.; New York Negotiable Instruments Law, § 36 (7).

(*l*) *Parsons on Bills*, vol. 1, p. 247.

(*m*) *Ex parte Buckley* (1845), 14 M. & W. 469.

within a reasonable time of the indorsement. If it be not so presented the indorser is discharged (*n*).

By sect. 10, read with sect. 89, a note is payable on demand which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

Reasonable time appears to be a mixed question of law and fact. Regard must be had to the nature of the instrument as a continuing security, *e.g.*, ten months may not be an unreasonable time (*o*).

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (*p*).

This sub-section negatives the application of sect. 36 (3), *ante*, to promissory notes payable on demand, which are in the nature of continuing securities. In the United States it appears to be settled that a note on demand is deemed overdue after the lapse of a reasonable time from its issue, regard being had to its nature as a continuing security, *e.g.*, it has been held that where a note on demand was indorsed eight months after its date, the

(*n*) *Chartered Bank v. Dickson* (1871), L. R. 3 P. O. 574; see at p. 579.

(*o*) *Ibid.* at pp. 579 and 584.

(*p*) See *Brooks v. Mitchell* (1841), 9 M. & W. 15; *Glasscock v. Balls* (1889), 24 Q. B. D. 13, C. A.

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indorsee took it subject to all equities attaching to it. It is to be noted that all parties resided in the same place (*q*).

Presentment
of note for
payment to
charge maker.

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable (*r*). In any other case, presentment for payment is not necessary in order to render the maker liable (*s*).

ILLUSTRATIONS.

1. A note is made payable to C. or order on demand. The holder can sue the maker without proving any presentment or demand (*t*).

2. B. makes a note payable to his own order and signs it. Below his signature are the words "Payable at the Union Bank, London." He then indorses the note in blank. The holder can sue the maker, B., without proving presentment (*u*).

Compare sect. 52 (1) and notes thereto as to presentment to charge the acceptor of a bill. By virtue of sect. 52 (2), read with sect. 89, where a note is payable on a day certain, the maker will not be discharged, because the note is not presented on that day (*x*). In the case of a note payable on demand, the Statute of Limitations runs in favour of the maker from the date of the note (*y*).

(*q*) *Herrick v. Woolverton* (1870), 41 New York R. 581; cf. New York Negotiable Instruments Law, § 131.

(*r*) *Spindler v. Grellett* (1847), 1 Exch. 384 (non-negotiable note); *Sands v. Clarke* (1849), 8 C. B. 751; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812; *Randall v. Thorn & Co.* (1878), W. N. p. 150, C. A.

(*s*) *Price v. Mitchell* (1815), 4 Camp. 200; *Exon v. Russell* (1816), 4 M. & S. 507; *Williams v. Waring* (1829), 10 B. & C. 2 (place of payment indicated by way of memorandum).

(*t*) Cf. *Walton v. Mascall* (1844), 13 M. & W. at pp. 455, 458; see, too, *Norton v. Ellam* (1837), 2 M. & W. at p. 464; and *Maltby v. Murrels* (1860), 5 H. & N. at p. 823.

(*u*) *Masters v. Baretto* (1849), 8 C. B. 433.

(*x*) See also *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moore, P. C. at p. 70; *Gordon v. Kerr* (1898), 25 Ct. of Sess. Cas. 570.

(*y*) *Norton v. Ellam* (1837), 2 M. & W. 464.

(2) Presentment for payment is necessary in order to render the indorser of a note liable (*z*). § 87.

To charge indorser.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable (*a*); but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable (*b*), but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice (*c*).

By virtue of sect. 89 presentment for payment will be governed by the same rules as apply to bills, as to which see sect. 45, *ante*. As to excuses for non-presentment and delay, see sect. 46, *ante*.

88. The maker of a promissory note by making it— Liability of maker.

- (1) Engages that he will pay it according to its tenor (*d*);
- (2) Is precluded from denying to a holder in due course (*e*) the existence of the payee and his then capacity to indorse (*f*).

The maker of a promissory note is the principal debtor on the instrument (*g*).

(*z*) Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at pp. 262, 263; *Britt v. Lawson* (1878), 22 Hun. R. 123, New York, joint and several note.

(*a*) *Roche v. Campbell* (1812), 3 Camp. 247.

(*b*) *Saunderson v. Judge* (1795), 2 H. Bl. 510.

(*c*) *Ibid.*; and see *Masters v. Baretto* (1849), 8 C. B. 433.

(*d*) *Story on Notes*, § 118; *Walton v. Mascall* (1844), 13 M. & W. at p. 458.

(*e*) See "holder in due course" defined by sect. 29, *ante*.

(*f*) *Drayton v. Dale* (1823), 2 B. & C. 293, bankrupt payee; *Lane v. Kreckle* (1869), 22 Iowa R. 399; cf. sect. 54, acceptor's estoppels. New York Negotiable Instruments Law, § 110.

(*g*) Cf. *Chartered Bank v. Dickson* (1871), L. R. 3 P. C. at p. 580.

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The maker is sometimes called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange (*h*). In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both. A note indorsed by the payee resembles an accepted bill payable to drawer's order and indorsed by the drawer, the payee corresponding with the drawer (*i*). The distinctions that exist between maker and acceptor arise from this. The acceptor is not the creator of a bill, his contract is supplementary, while the maker of a note originates the instrument. Hence (a) a note cannot be made conditionally (*k*), while a bill may be accepted conditionally; (b) the provisions of sect. 19 (2), *ante*, relating to bills accepted payable at a particular place, have no application to notes, which are therefore on the same footing as bills previous to the 1 & 2 Geo. 4, c. 78, which is reproduced in that section (*l*); (c) maker and payee are immediate parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties (*m*). See also sect. 89—*Damages*. The measure of damages against the maker of a note would in general be the same as against the acceptor of a bill, as to which see sect. 57, *ante*.

Application
of Part II.
to notes.

89. (1) Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note

(*h*) *Gwinnell v. Herbert* (1836), 6 N. & M. 723.

(*i*) *Heylyn v. Adamson* (1758), 2 Burr. at p. 678, Ld. Mansfield; and sect. 89 (2).

(*k*) See sect. 83, *ante*.

(*l*) Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at pp. 262, 263; *Emblin v. Dartnell* (1844), 12 M. & W. 830.

(*m*) Cf. *Bishop v. Young* (1800), 2 B. & P. at p. 83, Lord Eldon.

shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order (*n*). § 89.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(a) Presentment for acceptance;

(b) Acceptance;

(c) Acceptance *suprà* protest;

(d) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary. Protest of foreign note not required.

By the statute 3 & 4 Anne, c. 8, s. 1, promissory notes were made negotiable "in the same manner as inland bills of exchange are or may be by the custom of merchants." That Act, however, was, it seems, merely declaratory (*o*), and is repealed by this Act.

Sub-sect. (4) is declaratory (*p*), but it may be advisable to protest a foreign note for the purpose of charging a foreign party in his own country. See sect. 51, *ante*, as to foreign bills. As to conflict of laws, see sect. 72 (3), *ante*. The sub-section appears to apply only to foreign notes dishonoured in the British Islands. Cf. sect. 4, *ante*, as to inland and foreign bills.

(*n*) See *Heylyn v. Adamson* (1758), 2 Burr. at p. 678, per Lord Mansfield; cf. *Re George* (1890), 44 Ch. D. at p. 631.

(*o*) See *Goodwin v. Roberts* (1875), L. R. 10 Ex. at p. 350, per Cockburn, C.J.

(*p*) *Bonar v. Mitchell* (1850), 5 Exch. 415. Cf. New York Negotiable Instruments Law, § 189.

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PART V.

SUPPLEMENTARY.

Good faith.

90. A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

See sect. 29, *ante*, defining "holder in due course," and sect. 59, *ante*, defining "payment in due course." Cf. also sects. 60, 79, and 82.

The test of *bona fides* as regards bill transactions has varied greatly. Previous to 1820 the law was much as it now is under the Act. But under the influence of Lord Tenterden due care and caution was made the test (*q*), and this principle seems to be adopted by sect. 9 of the Indian Negotiable Instruments Act. In 1834 the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value (*r*). Two years later Lord Denman states it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it (*s*). This principle has never since been shaken in England, and it seems now firmly established in the United States (*t*).

Byles, J., in a judgment where he is distinguishing deeds from negotiable instruments, says, referring to the latter, "Honest acquisition confers title. To this despotic

(*q*) *Gill v. Cubitt* (1824), 5 D. & R. 324.

(*r*) *Crook v. Jadis* (1834), 5 B. & Ad. 909.

(*s*) *Goodman v. Harvey* (1836), 4 A. & E. at p. 876; cf. *Uther v. Rich* (1839), 10 A. & E. 784.

(*t*) *Murray v. Lardner* (1864), 2 Wallace, at p. 121, Sup. Ct. U. S.; *Chapman v. Rose* (1874), 56 New York R. at p. 140.

but necessary principle the rules of the common law are made to bend. . . . Negligence in the maker of such an instrument makes no difference in his liability to an honest holder for value. The instrument may be lost by the maker without his negligence, or stolen from him, still he must pay; the negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stop short of fraud, he has a title" (*u*). Test of *bona fides*.

The whole subject was fully discussed in a case in the Court of Appeal, where the question was whether the giving of a certain bill was a fraud by the drawer and acceptor on their creditors. Baggallay, L. J., in giving judgment, says, "I fully recognise the importance of maintaining the well-established principle that negligence or carelessness on the part of the holder of a bill is not of itself sufficient to deprive him of his remedies for procuring its payment. But negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*; and the question in this case is whether the surrounding circumstances accompanying the negligence or carelessness of the holder were such as to affect him with notice of the fraudulent character of the transaction out of which these bills originated" (*x*). Every case must be determined on its own merits. Good faith or bad faith is a question of *fact* depending on the circumstances of the individual case (*y*). It is for the tribunal, whether court or jury, that has to decide questions of fact, to determine whether a particular holder took a given bill *bonâ fide* or not. To this issue they must apply their common sense. As Lord Justice Brett observes in the same case, "If a jury has to consider facts, they are entitled and bound to make use of their general knowledge of business, in order to appreciate the evidence which is before them; and, if a court has to consider evidence, I think the judges are bound to use their own general knowledge of business, and of the ordinary moving motives of mankind, just as a jury would."

Lord Blackburn, in the House of Lords, thus sums up

(*u*) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 184.

(*x*) *Re Gomersall* (1875), 1 Ch. D. at p. 146, C. A.

(*y*) *Peacock v. Rhodes* (1781), 2 Doug. 633, per Lord Mansfield.

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the law on the subject:—"I consider it to be fully established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris* or when the bill is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, *whether the value be great or small*, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth, he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not have made any difference if he knew there was something wrong about it and took it. If he take it in that way he takes it at his peril. But then, I think, such evidence of carelessness or blindness as I have referred to may, with other evidence, be good evidence upon the question whether he did know there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank note when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions not because he was an honest blunderer, but because he thought in his own secret mind—I suspect there is something wrong, and, if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover,—I think that is dishonesty" (z).

(z) *Jones v. Gordon* (1877), 2 App. Cas. at p. 629, H. L.

91. (1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. § 91.
Signature.

ILLUSTRATIONS.

1. Bill payable to C.'s order, and indorsed in his name. It is proved that C.'s wife had authority to indorse bills for him, and that in this case C.'s indorsement was written by his daughter in the presence and by the direction of his wife. This is sufficient (a).

2. Bill addressed to B., and accepted in his name. It is shown that X., who wrote the acceptance, is in the habit of accepting bills in B.'s name, and that B. is aware of it, and duly honours such bills. This is evidence from which an authority to X. to accept bills for B. may be implied (b).

3. C., the holder of a bill payable to order, transfers it for value to D. without indorsing it. This is not an authority to D. to indorse it in C.'s name (c).

4. It is shown that X. has an express authority to draw bills in A.'s name. This of itself is not sufficient to show that he has authority to indorse bills for A. (d).

5. An express authority to an agent to receive payment from B., by drawing on him, does not authorize the agent to draw a bill payable to his own order (e).

6. An authority to a partner in a non-trading firm to draw cheques does not authorize drawing post-dated cheques, which for most purposes are equivalent to bills payable after date (f).

See further sect. 23, signature in assumed name, or firm name; sect. 24, forged or unauthorized signature; sect. 25, procuration signature; sect. 26, signature by agent or representative. The cases above cited seem to show that it is immaterial by what hand the signature is attached if there be authority to sign, express or implied: but that where the authority is express it must

(a) *Lord v. Hall* (1849), 8 C. B. 627; cf. *Lindus v. Bradwell* (1848), 5 C. B. at p. 591.

(b) Cf. *Morris v. Bethell* (1869), L. R. 5 C. P. at p. 51.

(c) *Harrop v. Fisher* (1861), 30 L. J. C. P. 283.

(d) Cf. *Prescott v. Flinn* (1832), 2 Bing. at p. 22; and Indian Act, s. 27.

(e) *Hogarth v. Wherley* (1875), L. R. 10 C. P. 630; and Indian Act, s. 27.

(f) *Forster v. Mackreth* (1867), L. R. 2 Ex. 163 (firm of solicitors).

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Signature by
agent.

be strictly construed. In *Lord v. Hall* (Illust. 1) (*g*), Maule, J., says: "The question is whether upon the evidence the wife was not acting in the strict exercise of the authority conferred on her by her husband in doing what she did, namely, in requesting a third person to do it in her presence. There was evidence that the wife had the general management of her husband's business. And when he authorized her to draw, accept, and indorse bills in his name, that may fairly be extended to authorizing her to select some person, *pro hac vice*, to write the name of her husband for her. It may be that this may lead to some inconvenience. . . . I find a case of *Ex parte Sutton* (2 Cox, Ch. C. 84), which may be worth considering with reference to this subject. It was there held that an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A. The way in which that case seems to me to apply to the present is this: the Lord Chancellor treats the extent of the authority as a matter of fact to be inferred from the evidence."

What a
sufficient
signature.

"Signature" may perhaps be defined as the writing of a person's name on a bill or note in order to authenticate and give effect to some contract thereon. A pencil signature to a bill has been held sufficient (*h*); and it has been suggested that a lithographed or stamped signature might be sufficient (*i*). A signature made by another person, but attested by mark, is sufficient (*k*). Where a note ran, "I, William Smith, promise to pay, &c." instead of "I promise to pay," with the signature below, it was held sufficiently signed (*l*), though such a signature is inconvenient and irregular. Where a statute requires an ordinary contract or document to be signed, a mere mark (*m*), or initials (*n*), or a stamp (*o*), if intended as signatures, are sufficient; and it is immaterial in what part of the document the name is introduced, provided it govern the whole. But legal analogies must be applied with caution to bills which are

(*g*) *Lord v. Hall* (1849), 8 C. B. at p. 630.

(*h*) *Geary v. Physic* (1826), 5 B. & C. 234.

(*i*) See *Ex parte Birmingham Bank* (1868), L. R. 3 Ch. App. at pp. 653, 654.

(*k*) *George v. Surrey* (1830), M. & M. 516.

(*l*) *Taylor v. Dobbins* (1719), 1 Stra. 399; cf. *Ruff v. Webb* (1794), 1 Esp. 129.

(*m*) *Baker v. Dening* (1838), 8 A. & E. 94.

(*n*) *Caton v. Caton* (1867), L. R. 2 H. L. 143.

(*o*) *Saunderson v. Jackson* (1800), 2 B. & P. 238.

the creation of custom, and where it is of the utmost importance that a clear title should appear on the face of the instrument. In America the rule is lax. A person who signed by initials was held liable as indorser of a cheque (*p*), and the same was held as to a person who indorsed by mark, viz., by writing the figures, 1, 2, 3 (*q*). By German Exchange Law, Art. 94, signature by mark is insufficient unless made before a notary.

Signature obtained by fraud as to nature of document.

The object of a signature is to authenticate a document. Where, then, a person is induced by fraud to sign a bill or note under the belief that he is signing a wholly different instrument, his signature is null and void, provided that in so signing he acted without negligence. Thus:—

1. D., an old man with enfeebled sight, is induced to sign his name on the back of a bill, by being told that it is a railway guarantee which he had promised to sign. The bill is negotiated to a holder in due course. D. is not liable as an indorser (*r*).

2. B. is induced by fraud to sign a negotiable note as maker, believing it to be a non-negotiable note for a less sum. Negligence is negatived. If the note is negotiated to a holder in due course, he (probably) cannot recover from B. (*s*).

3. B., a young man inexperienced in business, is induced by a friend in whom he has confidence to sign a promissory note as joint maker, under the belief that he is simply signing as an attesting witness. Negligence is negatived. The payee, who takes the note in good faith and for value, cannot recover on it from B. (*t*).

In *Foster v. Mackinnon*, Byles, J., says:—"The defendant, according to the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church,

(*p*) *Merchants' Bank v. Spicer* (1831), 6 Wend. 443.

(*q*) *Brown v. Butchers' Bank* (1844), 6 Hill. 443.

(*r*) *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704.

(*s*) *Griffiths v. Kellog* (1876), 20 Amer. R. 48.

(*t*) *Lewis v. Clay* (1897). ^{1A} Times L. R. 149

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or on the fly-leaf of a book, and there had already been without his knowledge a bill of exchange or promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons—first, that he never in fact signed the writing declared on, and, secondly, that he never intended to sign any such contract” (*u*). Frauds of this nature are more frequent in the United States than in England, owing to the absence of stamp laws. A man’s signature is obtained for some pretended purpose, and then a promissory note is over-written.

Seal of corporation as signature.

(2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Before this enactment it was very doubtful whether a bill or note issued by a corporation under its seal constituted a negotiable instrument (*x*). It was never doubted that a corporation (otherwise competent) could be bound by a bill or note duly signed on its behalf; and this was one of the recognized exceptions to the rule that a corporation can only contract under seal (*y*). It had further been held that a note made by the directors of a company, which was binding on them personally, was not affected by the addition of the corporate seal (*z*). In New York it was

(*u*) *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, see at p. 712.

(*x*) *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. at pp. 382, 383.

(*y*) *Grant on Corporations*, p. 61.

(*z*) *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361.

formerly held that a promissory note under seal was not negotiable unless issued by government (*a*).

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The usual form of signature for a corporation is a procuration signature. As regards companies under the Companies (Consolidation) Act, 1908, the form in which a bill or note must be drawn, made, indorsed, or accepted so as to bind the company is regulated by sects. 63 and 77 of that Act. See those sections set out in Appendix, *post*, p. 409, and cases thereon. In order to determine whether a company or other corporation is liable on a bill, three questions must be asked: 1. Has the company the requisite capacity to bind itself by a bill? 2. Is the signature on the bill sufficient in form to bind the company? 3. Was the signature placed there by a person having authority to sign bills for the company? Is it immaterial that a person who acts within the scope of his authority in signing bills exceeds or contravenes private instructions (*b*)? See further, sect. 22, and notes thereon, *ante*.

Signature of corporation or company.

When a company, under the Companies (Consolidation) Act, 1908, is voluntarily wound up, and two or more liquidators are appointed, a bill must be signed by at least two liquidators in order to bind the company (*c*).

Liquidators.

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

Computation of time.

“Non-business days” for the purposes of this Act mean—

(a) Sunday, Good Friday, Christmas day :

(b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it :

34 & 35 Vict. c. 17.

(a) *Merritt v. Cole* (1876), 9 Hun. R. 98; but see now § 25 of the New York Negotiable Instruments Law, and notes in *Crawford's* edition.

(b) *Re Land Credit Co.* (1869), L. R. 4 Ch. 460. As to the powers of *de facto* directors, cf. *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869. As to the authority of a manager in a foreign country, see *Re Cunningham & Co., Limited* (1887), 36 Ch. D. 532.

(c) *Ex parte Agra Bank* (1871), L. R. 6 Ch. 206. See sect. 151 (2) (d) of the Act of 1908 as to liquidators' powers as to bills and notes, and sect. 184 as to liquidators in voluntary winding up.

- § 92. (c) A day appointed by Royal proclamation as a public fast or thanksgiving day.
Any other day is a business day.

See sect. 42 as to leaving bills for acceptance: sect. 49 (12) as to notice of dishonour; and sect. 67 (2) as to presentment to the acceptor for honour.

See the Bank Holidays Acts, in the Appendix, *post*, p. 388, and sect. 14 (1), *ante*.

When noting equivalent to protest.

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

This section affirms the rule laid down in *Geralopulo v. Wieler* (d). The noting is in fact an incipient protest, and "is unknown in law as distinguished from the protest. The notary having made his minute, draws up the protest at his leisure" (e).

As to the application of this section, see sects. 51, 65, 67, 68.

Protest when notary not accessible.

94. Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured (f), any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the

(d) *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105; cf. *Leftley v. Mills* (1791), 4 T. R. at p. 175.

(e) *Selwyn*, N. P., 11th ed. p. 381.

(f) See *Somerville v. Aaronson* (1898), 25 R. 524 (Scotland).

bill, and the certificate shall in all respects operate as if it were a formal protest of the bill (*g*). § 94.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

For the form referred to, see *post*, p. 333. The enactment contained in this section is an extension of the inoperative provision of the repealed 9 Will. 3, c. 17, as to inland bills.

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend. Dividend warrants may be crossed.

For the provisions as to crossed cheques, see sects. 76—82, *ante*. The corresponding provision of the Crossed Cheques Act, 1876, s. 3, applied only to the dividend warrants of the Bank of England and Bank of Ireland. The present enactment applies to all dividend warrants.

[96. The enactments mentioned in the second schedule to this Act (*h*) are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Repeal.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.]

This section and the schedule of repeals, having done their work, are now repealed as spent by the Statute Law Revision Act, 1898.

(*g*) New York Negotiable Instruments Law, § 262, reproduces this provision in wider terms.

(*h*) *Post*, p. 334.

§ 97.

Savings.

97. (1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this Act contained.

Bankruptcy law.

This provision was intended to preserve such rules as the rule against double proof (*i*), the rule as to proof in respect of bills not yet due (*k*), or the rule that when a bill is pledged for less than its amount, the holder may prove for the full amount, though he cannot receive dividend for more than the sum advanced (*l*).

Common law.

(2) The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

This provision preserves a foreign drawer's right to prove for re-exchange against an English acceptor (*m*). So, too, it preserves the general rules of law relating to estoppels (*n*), and the rules of private international law, *e.g.*, the rule according to which the transfer of personal property is governed by the law of the country in which the property is transferred (*o*).

Custom of trade.

Questions relating to bills, when not concluded by authority, must as heretofore be determined by the usage of trade, if such there be (*p*). The existence, nature, and scope of a given usage is a question of fact (*q*). A general usage once incorporated into a judicial decision becomes

(*i*) *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 165.

(*k*) *Wood v. De Mattos* (1865), L. R. 1 Ex. 91.

(*l*) *Ex parte Newton, Re Bunyard* (1880), 16 Ch. D. 330, C. A.

(*m*) *Ex parte Roberts, Re Gillespie* (1885), 16 Q. B. D. 702; affirmed, 18 Q. B. D. 286, C. A.

(*n*) *Smith v. Prosser*, (1907) 2 K. B. at p. 746, C. A.; cf. *London Joint Stock Bank v. MacMillan*, (1918) A. C. 777, H. L. (negligence in drawing cheque).

(*o*) *Embiricos v. Anglo-Austrian Bank*, (1904) 2 K. B. 870; affirmed, (1905) 1 K. B. 677, C. A. See, further, notes to sect. 72 (2), *ante*.

(*p*) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, Ex. Ch.

(*q*) *Ibid.*

part of the law merchant, and evidence of custom to contradict it is inadmissible (*r*). Thus:—

1. Bill indorsed “Pay C.,” omitting the words “or order.” The Court of King’s Bench having decided that such bills are still negotiable by indorsement, evidence that by custom they are not negotiable was held inadmissible (*s*).

2. If a foreign bill be dishonoured, the indorser is by the law merchant liable for the re-exchange. Evidence that by local custom the holder is entitled either to the re-exchange or to the amount he gave for the bill, at his option, is inadmissible (*t*).

3. Action by customer (before the Stamp Act, 1870) against banker for not honouring a cheque. The banker may show that the cheque was marked “post-dated,” and that it was the custom of bankers in the City of London not to honour cheques which are marked “post-dated” (*u*).

Goodwin v. Roberts (*x*) is important as showing that the novelty of a general usage is no objection to its being incorporated into the law merchant. A particular or local usage must be proved *de novo* each time, until it becomes so notorious that the Courts will take judicial notice of it. It is difficult to say when this notoriety is acquired (*y*). When both authority and custom are silent, foreign law is usually resorted to as a guide. After referring to the cosmopolitan character of the law merchant in reference to bills, Lord Blackburn says:—“There are in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. . . . We continually, in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases

(*r*) *Ibid.* at p. 357; and cf. *Brandao v. Barnett* (1846), 3 C. B. at p. 530, H. L.

(*s*) *Edie v. East India Co.* (1761), 2 Burr. 1216. See now sect. 8, *ante*.

(*t*) *Suse v. Pompe* (1860), 30 L. J. C. P. 75.

(*u*) *Emanuel v. Roberts* (1868), 9 B. & S. 121. *Qu.* since the Stamp Act, 1870, if cheque be not presented before its nominal date; and see sect. 13 (2), *ante*.

(*x*) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, thereby to some extent overruling *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. at p. 386. See at p. 354, where the practice of a particular trade is distinguished from a general custom. Affirmed by House of Lords, 1 App. Cas. 476.

(*y*) Cf. *Ex parte Turquand* (1885), 14 Q. B. D. 636, at p. 645, C. A.

§ 97.

Ambiguous
instruments.

when they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurist, provided they bore upon the point" (z).

When the terms of a bill are ambiguous, the construction most favourable to the full validity of the instrument must be followed (a). Thus—

1. An acceptance will, if possible, be construed as absolute, not qualified, and a mere memorandum, inconsistent with such construction, is to be rejected as being no part of the acceptance (b).

2. The address to the drawee will be read in with the acceptance, *ut res magis valeat* (c).

3. Note in the form "I promise *not* to pay." The word "not" will be rejected (d).

Savings.

(3) Nothing in this Act or in any repeal effected thereby shall affect—

33 & 34 Vict.
c. 97.

(a) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue :

See the material provisions of the Stamp Act, 1891, as amended to date, set out *post*, p. 394.

25 & 26 Vict.
c. 89.

(b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies :

See sects. 63 and 77 of the Companies (Consolidation) Act, 1908, set out *post*, p. 409.

(z) *M'Lean v. Clydesdale Bank* (1883), 9 App. Cas. at p. 105. Cf. *Scaramanga v. Stamp* (1880), 5 C. P. D. at p. 303, as to American decisions.

(a) *Mare v. Charles* (1856), 5 E. & B. at p. 981, Ld. Campbell.

(b) *Fanshawe v. Peet* (1857), 26 L. J. Ex. 314; and cf. *Stone v. Metcalfe* (1815), 4 Camp. 217; *Fitch v. Jones* (1855), 5 E. & B. at p. 246; *Decroix v. Meyer* (1890), 25 Q. B. D. 343, C. A.

(c) *Mare v. Charles* (1856), 5 E. & B. 978.

(d) *Russel v. Langstaffe*, cited *Bayley on Bills*, 6; and *Simpson v. Vaughan* (1739), 2 Atkyns, 30.

- (c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively : § 97.
Bank of
England or
Ireland.

See restrictions on issue of bank notes, *ante*, p. 74.

- (d) The validity of any usage relating to dividend warrants, or the indorsement thereof. Dividend
warrants.

This provision was introduced in committee. It appears that when a dividend warrant was payable to the order of two or more persons, the practice then was to pay it on the indorsement of any one of them. As to ordinary bills and notes, see sect. 32 (3), *ante*. See further as to dividend warrants, *post*, p. 373.

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect, the law and practice in Scotland in regard to summary diligence. Saving of
summary
diligence in
Scotland.

Summary diligence in Scotland is founded on a protest for non-acceptance or non-payment which must be registered within six months (*e*). It is only competent where the instrument is regular on the face of it. For details of the practice, see *Thomson on Bills*, 2nd ed. p. 410; *Thorburn's Bills of Exchange Act*, p. 214.

A summary procedure to enforce bills, notes and cheques was provided for England by the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), commonly known as Keating's Act. This enactment has been superseded, as regards the High Court, by Order XIV.: but it is still in force with modifications in some inferior Courts, *e.g.*, the County Courts.

99. Where any act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act. Construction
with other
Acts, &c.

(*e*) *M'Neill v. Innes* (1917), 54 Scott. Law Reporter, 513.

§ 100.

Parole
evidence
allowed in
certain
judicial pro-
ceedings in
Scotland.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the Court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

This section was added in committee. Its object was to remove certain technicalities from the Scotch law of evidence which had frequently been adversely commented upon by the Courts. In many cases relevant facts could only be proved by writ or oath. See *Thorburn*, p. 218, and *Bell's Principles*, 9th ed. § 333 b. A somewhat wide construction has been put upon the section in the direction of allowing parole evidence to vary the contracts of the parties to bills or notes (*f*).

The sesennial prescription, which is the prescription applicable to bills and notes, runs from the time when payment is demandable (*g*). After that time the holder can only establish his claim by the writ or oath of the debtor, unless the statute has been interrupted by judicial demand or executed diligence (*h*).

(*f*) *Dryborough v. Roy* (1903), 5 F. 665; *Viani & Co. v. Gunn & Co.* (1904), 6 F. 989; *Manchester Banking Co. v. Ferguson & Co.* (1905), 7 F. 865.

(*g*) *Bell's Princ.* 9th ed. § 349; 12 Geo. 3, c. 72, ss. 37, 39.

(*h*) *Bell's Princ.* 9th ed. §§ 598, 599.

SCHEDULES.



FIRST SCHEDULE.

Form of protest which may be used when the Section 94.
services of a notary cannot be obtained.

Know all men that I, A. B. [householder],
of in the county of , in the United
Kingdom, at the request of C. D., there being no
notary public available, did on the day
of 18 , at demand payment [*or*
acceptance] of the bill of exchange hereunder
written, from E. F., to which demand he made
answer [state answer, if any] wherefore I now
in the presence of G. H. and J. K., do protest the
said bill of exchange.

(Signed) A. B.

G. H. }
J. K. } Witnesses.

N.B.—The bill itself should be annexed, or a
copy of the bill and all that is written thereon
should be underwritten.

See sect. 94, *ante*, as to this form.

SECOND SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title of Act and extent of Repeal.
9 Will. 3, c. 17	An Act for the better payment of Inland Bills of Exchange.
3 & 4 Anne, c. 8	An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better payment of Inland Bills of Exchange.
17 Geo. 3, c. 30	An Act for further restraining the negotiation of promissory notes and inland bills of exchange under a limited sum within that part of Great Britain called England.
39 & 40 Geo. 3, c. 42...	An Act for the better observance of Good Friday in certain cases therein mentioned.
48 Geo. 3, c. 88.....	An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum in England.
1 & 2 Geo. 4, c. 78 ...	An Act to regulate Acceptances of Bills of Exchange.
7 & 8 Geo. 4, c. 15 ...	An Act for declaring the law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day.
9 Geo. 4, c. 24	An Act to repeal certain Acts, and to consolidate and amend the laws relating to bills of exchange and promissory notes in Ireland. in part; that is to say, Sections two, four, seven, eight, nine, ten, eleven.
2 & 3 Will. 4, c. 98 ...	An Act for regulating the protesting for non-payment of Bills of Exchange drawn payable at a place not being the place of the residence of the drawee or drawees of the same.

Session and Chapter.	Title of Act and extent of Repeal.
6 & 7 Will. 4, c. 58 ...	An Act for declaring the law as to the day on which it is requisite to present for payment to Acceptor, or Acceptors <i>supra</i> protest for honour, or to the Referee or Referees in case of need, Bills of Exchange which have been dishonoured.
8 & 9 Vict. c. 37 in part.	An Act to regulate the issue of bank notes in Ireland, and to regulate the repayment of certain sums advanced by the Governor and Company of the Bank of Ireland for the public service. in part; that is to say, Section twenty-four.
19 & 20 Vict. c. 97 ... in part.	The Mercantile Law Amendment Act, 1856, in part; that is to say, Sections six and seven.
23 & 24 Vict. c. 111 ... in part.	An Act for granting to Her Majesty certain duties of stamps, and to amend the law relating to the stamp duties, in part; that is to say, Section nineteen.
34 & 35 Vict. c. 74 ...	An Act to abolish days of grace in the case of bills of exchange and promissory notes payable at sight or on presentation.
39 & 40 Vict. c. 81 ...	The Crossed Cheques Act, 1876.
41 & 42 Vict. c. 13 ...	The Bills of Exchange Act, 1878.

Enactment Repealed as to Scotland.

19 & 20 Vict. c. 60 ... in part.	The Mercantile Law (Scotland) Amendment Act, 1856, in part; that is to say, Sections ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen.
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LIMITATIONS.

Statute of Limitations.

Limitation,
how com-
puted against
the several
parties.

Rule 1. Subject to the case provided for by sect. 48 (1) of the Act and rule 5, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the *then* holder against such party (a).

ILLUSTRATION.

C. is the holder of a dishonoured bill. Three years after the dishonour he indorses the bill to D. D. must sue the acceptor within the next three years, though he (presumably) has six years within which he may sue C.

Note.—Sect. 48 (1), *ante*, saves the rights of a holder in due course who takes a bill dishonoured by non-acceptance without notice of that fact.

By the Limitation Act, 1623 (21 Jac. 1, c. 16, s. 3), all actions of account and upon the case and all actions of debt grounded upon any lending or contract without speciality shall be commenced and sued within six years next after the cause of such actions and not after. Under this enactment, it was held that any acknowledgment of the debt after it was due was equivalent to a fresh promise to pay it, defeating the statute, and causing it to run only from the date of the acknowledgment (b). This doctrine has been considerably narrowed by subsequent legislation. See note to Rule 5, *post*, p. 341.

It is to be noted that the 3 & 4 Anne, c. 8, which put promissory notes on the same footing as bills of exchange, has been repealed (c). Sect. 4 of that Act applied the provisions of 21 Jac. 1, c. 16, to promissory notes, but the whole Act was repealed as unnecessary when a legislative definition was given of promissory notes (as is done by sect. 83), which clearly brought them within the general words of the statute of James.

(a) Cf. Jac. 1, c. 16; *Whitehead v. Walker* (1842), 9 M. & W. 506; *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

(b) *Re River Steamer Co.* (1871), L. R. 6 Ch. App. 822, at p. 828.

(c) In Ruffhead's edition of statutes the Act appeared as 3 & 4 Anne, c. 9, and the sections were numbered differently.

The repeal of the statute of Anne may, however, have an important bearing on notes made under the seal of a corporation as provided for by sect. 91 (2), *ante*. Such notes might be held to come under the 3 & 4 Will. 4, c. 42, s. 3, which enacts that all actions of covenant or debt upon any bond or other specialty shall be commenced and sued within twenty years after the cause of such actions and not after.

There is sometimes a difficulty in proving the fact which sets the statute running. For instance, if a note be payable three months after demand, the statute cannot begin to run till three months after demand be made. If the maker be dead it may be impossible to prove the demand on him. In such cases, after the lapse of a considerable time, a presumption of payment seems to arise independent of the statute (*d*).

In calculating the six year period of limitation it must be noted that, when a debt is payable on a day certain, the debtor has the whole of the day in which to pay, and that no cause of action arises until that day has expired (*e*).

Rule 2. As regards the acceptor, time begins to run from the maturity of the bill, unless— Acceptor or maker.

- (1) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment (*f*); or
- (2) The bill is accepted after its maturity, in which case time (probably) runs from the date of acceptance (*g*).

ILLUSTRATIONS.

1. Bill payable *in futuro*, e.g., three months after date or sight. Time runs in favour of the acceptor from the maturity of the bill, and not from the day the acceptance is given (*h*).

2. Note payable three months after date. The last day of grace is 22 September, 1906. If the note is unpaid, the cause of action arises on the 23 September, and the six year period of limitation expires on the 22 September, 1912. If that day is a Sunday, and the writ is issued on Monday, it is too late (*i*).

3. B. in 1840 gives a blank acceptance to C. In 1850 it is filled up as a bill payable three months after date, and negotiated to a *bonâ fide* holder. Time runs in favour of B. from the maturity of the bill (*k*).

(*d*) *Re Rutherford* (1880), 14 Ch. D. 687, at p. 691, C. A., where twenty years had elapsed.

(*e*) *Kennedy v. Thomas*, (1894) 2 Q. B. 759, C. A.; *Gelmini v. Moriggia*, (1913) 2 K. B. 549.

(*f*) Cf. sect. 52, *ante*.

(*g*) Cf. sect. 10 (2), *ante*.

(*h*) *Holmes v. Kerrison* (1810), 2 Taunt. 323; cf. *Fryer v. Rowe* (1852), 12 C. B. 437. See sect. 14, *ante*, computation of time of payment.

(*i*) *Gelmini v. Moriggia*, (1913) 2 K. B. 549.

(*k*) *Montague v. Perkins* (1853), 22 L. J. C. P. 187; cf. sect. 20.

4. Note payable on demand (with or without interest), and issued on the day it bears date. Time runs in favour of the maker from the date of the note, and not from the date of demand (*l*).

5. Note payable on demand, dated January 1, is not issued till July 1. Time runs in favour of the maker from July 1, the day of issue (*m*).

6. Note payable three months after demand. Time runs in favour of the maker from the time when the bill is payable (*n*).

Drawer or
indorser.

Rule 3. As regards the drawer or an indorser, time (generally) begins to run from the date when notice of dishonour is received (*o*).

ILLUSTRATIONS.

1. Bill payable ninety days after sight is dishonoured by non-acceptance. As regards the drawer time runs against the holder from the dishonour by non-acceptance and notice thereof. If the bill is presented for payment and again dishonoured, no fresh cause of action arises (*p*).

2. A bill drawn on B. C. indorses it for A.'s accommodation. The bill is dishonoured, and five years after the dishonour, C., as indorser, is obliged to pay the holder. Two years later (*i.e.*, seven years after the dishonour), C. sues A. on the bill. The action is barred. *Aliter* if C. sued A. on the implied contract of indemnity (*q*).

3. C. is the indorser of a bill or note payable on demand. Time in ordinary cases does not begin to run in favour of C. until demand has been made and notice given (*r*). See sect. 47.

In England it has been held that the holder's right of action against the drawer or an indorser is complete when notice of dishonour is received (*s*); when then does the cause of action arise when the notice is delayed or lost in the post? Perhaps from the time when it ought to have been received. In America the

(*l*) *Norton v. Ellam* (1837), 2 M. & W. 461; cf. *Jackson v. Ogg* (1859), Johns. at p. 400; *Wheeler v. Warner* (1872), 47 New York R. 519; cf. *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. at p. 37, C. A.; (1918) 2 K. B. 832, distinguishing collateral from direct promises.

(*m*) *Savage v. Aldren* (1817), 2 Stark. 232; cf. *Richards v. Richards* (1831), 2 B. & Ad. 447; *Watkins v. Figg* (1863), 11 W. R. 258.

(*n*) *Thorp v. Coombe* (1826), 8 D. & R. 347; cf. *Way v. Bassett* (1845), 5 Hare, 55; *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

(*o*) Cf. *Castrique v. Bernabo* (1844), 6 Q. B. 498; and sect. 43, *ante*.

(*p*) *Whitehead v. Walker* (1842), 9 M. & W. 506.

(*q*) *Webster v. Kirk* (1852), 17 Q. B. 944; cf. *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

(*r*) Cf. *Re Brown's Estate*, (1893) 2 Ch. at pp. 304, 305.

(*s*) *Castrique v. Bernabo* (1844), 6 Q. B. 498.

balance of authority favours the view that the cause of action is complete when notice of dishonour is sent (*t*). In cases where notice of dishonour is unnecessary probably the cause of action arises on dishonour.

A difficulty arises in the case of a bill payable on demand when presentment for payment is excused, and presentment is not made in fact. On principle, it would seem that time should run in favour of the drawer or indorser from the date when the holder was entitled to treat the bill as dishonoured (see sects. 46 (2) and 47), but the cases are conflicting (*u*).

Rule 4. When an action is brought against a party to a bill, to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which time begins to run. Collateral obligations.

ILLUSTRATIONS.

1. B. accepts a bill to accommodate the drawer. It is dishonoured, and two years afterwards B. is compelled to pay the holder. B. sues the drawer on the implied agreement to indemnify. Time runs from the date B. was compelled to pay, and not from the maturity of the bill (*x*).

2. B. authorizes A., an agent abroad, to draw upon him for the price of the goods to be shipped to B. B. dishonours a draft so drawn, and A. is compelled to take it up. A. can sue B. on an implied contract to indemnify. Time runs from the date when A. was compelled to pay (*y*).

3. A., intending to lend C. 50*l.*, draws a cheque in C.'s favour for that sum. A. sues C. to recover the loan. Time runs from the date when the cheque was cashed (*z*).

See note *ante*, p. 227, distinguishing a right of action on a bill from a right of action which a party to a bill may have arising out of the bill transaction but independent of the instrument.

Foreign laws and conflict of laws.—In France the period of limitation is five years, and the time, it seems, begins to run against acceptor, drawer, and indorsers from the day of protest (*a*). By German Exchange Law, Art. 77, the limitation as regards the acceptor is three years, starting from the maturity of the bill; but as regards the drawer or indorsers, it is three Foreign laws

(*t*) *Daniel*, § 1212; *Shed v. Brett* (1823), 18 Massachus. R. 401.

(*u*) Cf. *Re Bethell* (1887), 34 Ch. D. 561, Stirling, J.; but see *contra Re Boyse* (1886), 33 Ch. D. 612.

(*x*) *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Angrove v. Tippet* (1865), 11 L. T. N. S. 708; but cf. *Coppin v. Gray* (1842), 11 L. J. Ch. 105, as to a premature payment; see *Davies v. Humphreys* (1840), 6 M. & W. 153, contribution among co-makers.

(*y*) *Huntley v. Sanderson* (1833), 1 Cr. & M. 467.

(*z*) *Garden v. Bruce* (1868), L. R. 3 C. P. 300.

(*a*) French Code, Art. 189; *Nouguier*, § 1605.

months, starting from the day of protest, if the drawer or indorser live and the bill be payable in Europe. Where laws conflict as to time of limitation, and the limitation, as in England, merely bars the remedy, the *lex fori* governs (*b*). *Aliter* probably when lapse of time operates as a discharge.

Statute, how defeated.

Rule 5. Any circumstance which postpones or defeats the operation of the Statute of Limitations in the case of an ordinary contract postpones or defeats it in like manner in the case of a bill.

No indorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment is made is sufficient to defeat the operation of the statute (*c*).

ILLUSTRATIONS.

1. The holder of an accepted bill dies intestate before its maturity. The statute does not begin to run until an administrator is appointed (*d*).

2. The holder of a bill at the time of its dishonour is a minor or a lunatic. The statute does not begin to run against such holder until the disability ceases (*e*).

3. Note payable on demand, no mention of interest being made in it. Proof that interest has been paid takes the note out of the statute (*f*).

4. Note payable on demand with interest. Four years after its issue the holder sues the maker for interest, and recovers. Three years later (*i.e.*, seven years after issue of note) the holder sues the maker on the note. The action is barred (*g*). *Aliter* if the payment of interest had been voluntary.

5. Note payable three months after demand. Interest is paid on it, as appears from indorsement on the back of the note. This is evidence of a demand, and the statute begins to run from the first payment of interest (*h*).

6. An acknowledgment in writing signed by the party sought to be charged defeats the operation of the statute, *e.g.*, the maker of a note twenty years after its maturity signs his name on the back, and adds the date. The holder can sue the maker within six years after this acknowledgment (*i*).

(*b*) *Don v. Lippmann* (1837), 5 Cl. & F. 1, H. L.

(*c*) 9 Geo. 4, c. 14, s. 3.

(*d*) *Murray v. East India Co.* (1821), 5 B. & Ald. 204; see conversely *Maxwell v. Tuhill* (1878), 1 Ir. L. R. Ch. D. 250, death of acceptor intestate.

(*e*) Cf. 21 Jac. 1, c. 16; *Scarpellini v. Atcheson* (1845), 7 Q. B. 864.

(*f*) *Bamfield v. Tupper* (1851), 7 Exch. 27.

(*g*) *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493; see also *Harding v. Edgecumbe* (1859), 28 L. J. Ex. 313, payment by agent.

(*h*) *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

(*i*) *Bourdin v. Greenwood* (1871), L. R. 13 Eq. 281. See as to

7. A note is indorsed away by the payee for value. Subsequently the maker, not knowing of the indorsement, makes a payment on account to the payee. This payment does not take the case out of the statute (*k*).

8. A cheque is given in part payment of a debt, and is duly honoured. The statute runs from the time the cheque was given, and not from the time when it was paid (*l*).

A debt may be taken out of the Statute of Limitations in two ways, (1) by a written acknowledgment of the debt after it has become due, and (2) by a payment on account of principal or interest.

Before Lord Tenterden's Act (9 Geo. 4, c. 14), a bare verbal acknowledgment was sufficient. But now by sect. 1 of that Act, as amended by sect. 13 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), the acknowledgment must be in writing, and signed by the debtor or his authorized agent, and must be in such terms as to indicate a promise to pay. "To take the case out of the statute," says Mellish, L.J., "either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed" (*m*). A written promise to pay any balance which may be found to be due when an account is taken is a sufficient promise to take the case out of the statute (*n*).

Lord Tenterden's Act, which required the acknowledgment to be in writing, expressly provided that nothing therein contained should "alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." (9 Geo. 4, c. 14, s. 1.) "The principle," says Blackburn, J., "laid down as to an acknowledgment, has been applied in all cases upon part payment, namely, that it must be such that a promise [to pay] may be inferred in fact, not merely implied in law" (*o*).

By 9 Geo. 4, c. 14, s. 1, as amended by 19 & 20 Vict. c. 97, s. 14, an acknowledgment or part payment by one co-debtor or co-contractor does not prevent the statute from running in favour of the other or others (*p*), and by sect. 10 of the latter Act, the absence of the plaintiff beyond the seas, or his imprisonment, does not prevent the statute from beginning to run.

acknowledgments, *Re River Steamer Co.* (1871), L. R. 6 Ch. at p. 828, Mellish, L.J.; *Chasemore v. Turner* (1875), L. R. 10 Q. B. 500, Ex. Ch.; *Parson v. Nesbitt* (1915), 60 S. J. 69.

(*k*) *Stamford Banking Co. v. Smith*, (1892) 1 Q. B. 765, C. A.

(*l*) *Marreco v. Richardson*, (1908) 2 K. B. 584, C. A.

(*m*) *Re River Steamer Co. (Mitchell's Claim)* (1871), L. R. 6 Ch. App. 822, at p. 828; cf. the test proposed by Bowen, L.J., in *Green v. Humphreys* (1884), 26 Ch. D. 474, at p. 479, C. A.

(*n*) *Langrish v. Watts* (1903), 72 L. J. K. B. 435, C. A.

(*o*) *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493, at p. 498; cf. *Davies v. Edwards* (1851), 7 Exch. 22, at p. 25, per Parke, B.

(*p*) Cf. *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. at p. 36, C. A.

Where the statute begins to run, no supervening disability stops it. It is clear then that if a dishonoured bill be indorsed to an infant the time still runs on (*q*). On the other hand, if the holder of a bill at the time of dishonour be an infant, and he subsequently indorse it while still an infant to an adult, it is conceived that the statute runs from the indorsement in favour of the parties liable on the bill. It seems that an acknowledgment to the holder enures for the benefit of a subsequent holder (*r*); but an acknowledgment to a previous indorser, who at the time does not hold the bill, is ineffectual (*s*).

(*q*) *Rhodes v. Smethurst* (1840), 6 M. & W. 351, Ex. Ch.

(*r*) *Byles*, 12th ed. p. 359; cf. *Cripps v. Davis* (1843), 12 M. & W. 159.

(*s*) *Stamford Banking Co. v. Smith*, (1892) 1 Q. B. 765.

SECURITIES FOR BILLS OF EXCHANGE.

Rights of Drawer.

Rule 1. Apart from special contract,—

(1) Where goods are sold, to be paid for by buyer's acceptance of seller's draft, and the acceptor fails or dishonours the bill, the lien of the drawer as unpaid vendor thereupon revives, if he has not parted with the possession of the goods or can stop them in transitu; and it is immaterial that the drawer has negotiated the bill (*t*).

Drawer's lien
as unpaid
vendor.

(2) Where an agent buys goods for his principal, and draws on the principal for the price, his rights, in this respect, are the same as those of an ordinary vendor (*u*).

It is essential to distinguish between the sale of goods to the acceptor, where the property in them vests absolutely in him, subject only to the vendor's lien until they reach his possession, and the case of goods which are sent to the acceptor as cover for the bill, where there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein (*x*). The rights and duties of a commission merchant who buys for a foreign principal are explained by Lord Blackburn in *Ireland v. Livingston* (*y*).

Rule 2. Where the drawer of a bill remits goods or securities to the drawee as cover for the bill, and in consequence of the drawee's failure is obliged to take up the bill, he is entitled to the return of any such goods or securities as the drawee may hold unrealized at the time of his failure (*z*).

(*t*) *Gunn v. Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. 491; cf. *Ex parte Chalmers* (1873), L. R. 8 Ch. at p. 292; *Ex parte Lambton* (1875), L. R. 10 Ch. at p. 415; Sale of Goods Act, 1893 (56 & 57 Viet. c. 71), s. 38.

(*u*) *Ex parte Banner* (1876), 2 Ch. D. at p. 287, C. A.; cf. *Ex parte Gomez* (1875), L. R. 10 Ch. at p. 645.

(*x*) *Ibid.* See, too, *Ex parte Lambton* (1875), L. R. 10 Ch. at p. 416.

(*y*) *Ireland v. Livingston* (1872), L. R. 5 H. L. at p. 408.

(*z*) Cf. *Re Broad, Ex parte Neck* (1884), 13 Q. B. D. 740, C. A.; *Ex parte Dever* (No. 2) (1885), 14 Q. B. D. 611, at p. 624, per Cotton, L.J., C. A.; and see Rule 4.

Rights of Drawee or Acceptor.

Right or lien
of acceptor.

Rule 3. Where the drawer of a bill of exchange remits goods or securities to the drawee as cover for it, and the drawee accepts, he thereby acquires a lien upon or right to the goods or securities (*a*). If the drawee do not accept he has no right to or lien upon the goods and securities (*b*).

ILLUSTRATIONS.

1. A. consigns goods to B., and draws on him for the price. A. sends the bill of lading and bill of exchange to his own agent, who forwards them to B., requesting him to accept the bill. If B. do not accept the bill of exchange he cannot retain the bill of lading (*c*).

2. A., the principal, sends goods to B., his agent, on the terms that B. is to sell the goods, receiving a commission, and to accept A.'s drafts in proportion to the goods sent, and if the proceeds of the goods do not cover the acceptances in full, A. is to remit the difference. B. accepts for 200*l*. Before the bill matures A., the drawer, fails. B. has a lien on the goods to the extent of 200*l*. (*d*).

3. A. consigns goods to B. for sale, draws on him for the price, and negotiates the bill of exchange with bill of lading attached. B. accepts the bill, payable on delivery of bill of lading. B. fails before the bill matures. This operates as a pledge of B.'s interest in the goods to the holder, who becomes, as regards B., a secured creditor (*e*).

4. An English accepting house undertakes for a commission to finance shipments from Chile to a firm in Germany. A cargo is sold to the German firm, and the seller draws on the English house for the price, and sends the bill of lading to the English house, which accepts and pays the bill of exchange. While the cargo is at sea war breaks out with Germany, and the cargo is

(*a*) *Ex parte Brett* (1871), L. R. 6 Ch. at p. 841; *Ex parte Oriental Bank Corporation* (1874), 30 L. T. 803, L.J.J.; *Re Pavy's Patent Fabric Co.* (1876), 1 Ch. D. 631; *Lutscher v. Comptoir d'Escompte* (1876), 1 Q. B. D. 709; cf. *Ex parte Banner* (1876), 2 Ch. D. at p. 287, C. A.; see, too, *Steele v. Stuart* (1866), L. R. 2 Eq. 84.

(*b*) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; see, at p. 133, per Ld. Cairns, and the comment on this case in *Ex parte Banner* (1876), 2 Ch. D. at p. 288, C. A.; see, too, *Torrance v. Bank of British America* (1873), L. R. 5 P. C. 246; and *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 19 (3); *Barton, Thompson & Co. v. Vigers Brothers* (1906), 19 Com. Cas. 175; distinguished *Jordeson & Co. v. London Hardwood Co.* (1906), 19 Com. Cas. at p. 172 (action by agent when principal ought to have sued).

(*c*) *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116.

(*d*) *Re Pavy's Patent Fabric Co.* (1876), 1 Ch. D. 631; see, *passim*, *Ex parte Dickin* (1878), 8 Ch. D. 377.

(*e*) *Ex parte Brett* (1871), L. R. 6 Ch. at p. 841.

captured by an English cruiser. It is condemned as prize, because it is German property. The English house has only the rights of a pledgee, and those rights are not recognized by the Prize Court (*f*).

5. Goods consigned for sale from A. in America to B. in England. The consignor draws on B. for the price, and discounts the bill with the bill of lading attached. The property in the goods *primâ facie* passes to B. when he receives the bill of lading and accepts the bill of exchange (*g*).

Lord Cairns points out in *Banner v. Johnston* (*h*), that where a bill is only allowed to be drawn against shipments or against bills of lading, the stipulation is for the assurance and protection of the drawee, and not for the benefit of the holder. In France, it seems, the property in the goods would pass with the bill. See *Nouguier*, § 715, and Belgian Code, Art. 26.

The ordinary rights of the parties may of course be varied by the terms of the credit under which the bill is drawn, and the real relations of the parties. For example, when a documentary bill is accepted the acceptor may be the buyer of the goods, or the drawer's agent for sale, or he may be accepting the bill to finance a third party who is the real buyer (*i*).

Rule 4. If the acceptor fails during the currency of the bill or dishonours it at maturity, his lien upon or right to the goods or securities is thereby determined, and he holds them at the disposition of the drawer (*k*).

Effect of
acceptor's
failure.

ILLUSTRATIONS.

1. A. draws on B., and remits to B. bills of other parties which he holds to provide B. with funds. B. accepts, fails before his acceptances mature, and compounds, paying the bill-holders 5s. in the pound. If B. realizes the bills sent him as cover, A. is entitled to the balance of the proceeds of such bills as were in specie at the time of the failure, after deducting the actual amount paid by B. on his acceptances (*l*).

2. An agent buys goods for his principal, remits them to him, and draws on him for the price. The principal accepts the bill, but fails before it matures. The property in the goods does not

(*f*) *The Odessa*, (1916) A. C. 145, P. C. The only remedy of the English house is an appeal to the bounty of the Crown.

(*g*) *The Prinz Adelbert*, (1917) A. C. 586, P. C.

(*h*) *Banner v. Johnston* (1871), L. R. 5 H. L. at p. 174.

(*i*) As to measure of damages when the third party does not recoup the acceptor, see *Re Ludvig Tilman* (1918), 34 T. L. R. 322.

(*k*) *Tooke v. Hollingworth* (1793), 5 T. R. 215; approved *Ex parte Banner* (1876), 2 Ch. D. at p. 289, C. A.; *Ex parte Kelly & Co.* (1879), 11 Ch. D. 306, C. A.; *Re Gothenburg Commercial Co.* (1881), 29 W. R. 358, C. A.; cf. *Ex parte Smart* (1872), L. R. 8 Ch. Ap. at p. 224.

(*l*) *Ex parte Gomez* (1875), L. R. 10 Ch. 639.

re-vest in the drawer, for the goods are the principal's absolutely (*m*).

3. A bill for 400*l.* is accepted to accommodate the drawer. The drawer forwards to the acceptor the bill of a third party for 400*l.* to provide for the acceptance. The acceptor discounts the remitted bill, being entitled to do so by the course of dealing, and fails before his acceptance matures. The drawer is not entitled to the proceeds of the remitted bill (*n*).

4. A., in America, consigns cheese to a factor in England, and draws on him a bill running: "Pay to the order of C. 1,000*l.*, and charge the same to account of cheese, per *Britannic*, as advised." The same day A. writes to the factor, enclosing bills of lading for the cheese, and saying: "Against these we value on you in favour of C." A., the drawer, fails, and the factor refuses to accept. C., the bill-holder, has no claim on the goods (*o*). They belong to the drawer's trustee.

The case of *Brown v. Kough* (*p*) seems finally to dispose of the often discredited case of *Frith v. Forbes* (*q*), by treating it as an erroneous finding on a question of fact. As Mellish, L.J., says in *Robey v. Ollier* (*r*): "A mercantile man who is intended to have a lien on a cargo expects to have a bill of lading annexed (to the bill of exchange); if there is no bill of lading annexed, he only expects to get the security of the bill itself. In *Frith v. Forbes*, the Court considered that, taking all the letters together, there was an equitable assignment (in favour of the bill-holder)."

Where remittances are made to cover bills, and the drawer by a collateral agreement has assigned his rights to a particular holder, the acceptor holds the remittances for the benefit of that holder as equitable assignee (*s*).

Rights of Holder.

Rule 5. Where the drawee or acceptor of a bill is indebted to, or has in his hands funds of the drawer sufficient to meet it, the bill does not operate as an assignment of the debt or funds in favour of the holder (*t*).

(*m*) *Ex parte Banner* (1876), 2 Ch. D. 278, C. A.; see at p. 289; see *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160.

(*n*) *Re Broad, Ex parte Neck* (1884), 13 Q. B. D. 740, C. A.; cf. *Ex parte Dever, Re Suse* (1884), 13 Q. B. D. 766, C. A.; *aliter*, it seems, if the security were in specie at the time of failure.

(*o*) *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, C. A.; cf. *Phelps v. Comber* (1885), 29 Ch. D. 813, C. A.

(*p*) *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, C. A.

(*q*) *Frith v. Forbes* (1862), 4 De G. F. & J. 409.

(*r*) *Robey v. Ollier* (1872), L. R. 7 Ch. at p. 699.

(*s*) *Ex parte Carrick* (1858), 2 De G. & J. 208.

(*t*) See sect. 53, *ante*; and *Shand v. Du Buisson* (1874), L. R. 18

Bill not an
assignment
of funds.

Such an assignment can only be effected by agreement extraneous and collateral to the bill (*u*).

ILLUSTRATIONS.

1. A., having a fund in B.'s hands, draws on B. a bill for the exact amount of the fund. This does not operate as an assignment of the fund to the payee (*x*).

2. The holder of a bill purchases it on the faith of a verbal representation made by the drawer that funds sufficient to meet it have been remitted to the drawee, that it is drawn against those funds, and that it certainly will be paid. The drawer fails, and the drawee refuses to accept the bill, though he has funds sufficient to meet it. The bill-holder is not entitled to those funds, and the drawee is justified in handing them over to the drawer's trustees (*y*).

This rule does not apply to Scotland. See sect. 53, *ante*.

Rule 6. Subject to Rule 7 (double insolvency), where a bill of exchange is on the face of it expressed to be drawn against specific goods or securities, the holder does not obtain thereby any charge upon the goods or securities if the bill be dishonoured (*z*).

Bill drawn
against
specific goods.

Such charge can only be created by agreement collateral to the bill, and in favour of the person with whom the agreement is made (*a*), or (perhaps) by the terms of a conditional acceptance (*b*).

ILLUSTRATIONS.

1. Under a credit, No. 20, a consignor of cotton is entitled to draw on the consignee "against cotton purchased according to instructions." The consignee accepts a draft expressed to be drawn "against credit, No. 20," receives the cotton, but fails

Eq. 283, bill; *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74, cheque; *Schroeder v. Central Bank* (1876), 34 L. T. N. S. 735, cheque.

(*u*) *Thomson v. Simpson* (1870), L. R. 5 Ch. 659; *Citizens' Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352; see at pp. 360 and 366.

(*x*) *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283.

(*y*) *Citizens' Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352.

(*z*) *Inman v. Clare* (1858), Johns. R. at p. 776; *Robey v. Ollier* (1872), L. R. 7 Ch. 695, at p. 698.

(*a*) *Ibid.*; see *Ex parte Imbert* (1857), 1 De G. & J. 152; *Ex parte Carrick* (1858), 2 De G. & J. 208; *Ranken v. Alfaro* (1877), 5 Ch. D. 786, C. A., where the holder's charge has been upheld; and *Latham v. Chartered Bank* (1874), L. R. 17 Eq. 205, for the construction of a letter of hypothecation.

(*b*) *Ex parte Brett* (1871), L. R. 8 Ch. 841, C. A.

before the bill matures, and dishonours it. The holder has no charge on the cotton (*c*).

2. A. consigns by ship *Acacia* a cargo to B., and draws a bill on B. running, "Pay to my order 100*l.*, which place to account cargo per *Acacia*." B. promises A. to protect the draft. An indorsee has no charge on the cargo if B. refuses to accept the bill (*d*).

3. A. in India sells and ships cotton to B. in England, and draws for the price a bill running, "Pay C. or order 1,000*l.*, and place the same to account cotton shipments as advised." B. promises the drawer to protect the bill, accepts it, and gets the bills of lading. Before the bill matures, B. fails, and A.'s English house takes it up. The English house has no charge on the cotton (*e*).

4. Bills are drawn under a credit against specific consignments. By the terms of the credit, which is shown to the holder, the bills are to be accompanied by bills of lading which are to be surrendered to the drawee on acceptance. If the acceptor fails, the billholder has no claim on the consignments or their proceeds (*f*).

See further, Illustration 4 to Rule 4, *ante*, and the note at the end of that rule. The holder of a documentary bill who in good faith presents it for acceptance or payment is not responsible for the authenticity of the documents attached (*g*).

Double
insolvency
of parties
liable.

Rule 7. Where the estates of two insolvent (*h*) parties both liable to the holders of bills of exchange (*i*) are administered under the control of a court of justice (*k*), and one of those parties holds goods or securities of the other's (*l*) as cover for the bills (*m*), the holders are entitled to have the proceeds of those goods and securities applied in payment of the bill (*n*), provided that the goods

(*c*) *Banner v. Johnston* (1871), L. R. 5 H. L. 157.

(*d*) *Robey v. Ollier* (1872), L. R. 7 Ch. 695.

(*e*) *Ex parte Arbuthnot* (1876), 3 Ch. D. 477, C. A.

(*f*) *Ex parte Dever, Re Suse* (1884), 13 Q. B. D. 766, C. A. The appropriation is for benefit of drawee, not holder.

(*g*) *Guarantee Trust Co. of New York v. Hannay & Co.*, (1918) 2 K. B. 623, C. A.

(*h*) *Hickie's Case* (1867), L. R. 4 Eq. 226.

(*i*) *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. 561.

(*k*) *Powles v. Hargreaves* (1853), 23 L. J. Ch. 1.

(*l*) *Ex parte Lambton* (1875), L. R. 10 Ch. App. 405, see at pp. 416, 417; *Ex parte Banner* (1876), 2 Ch. D. at p. 287, C. A.; and see *Banner v. Johnston* (1871), L. R. 5 H. L. at p. 174.

(*m*) *Levi & Co.'s Case* (1869), L. R. 17 Eq. 449; *Ex parte Alliance Bank* (1869), L. R. 4 Ch. App. 423.

(*n*) *Ex parte Waring* (1815), 19 Ves. 345; *Ex parte Parr* (1818), Buck. 191; *City Bank v. Luckie* (1870), L. R. 5 Ch. App. 773; *Bank of Ireland v. Perry* (1871), L. R. 7 Ex. 14; *Ex parte Derwhurst* (1873), L. R. 8 Ch. App. 695.

or securities remained unrealized at the time of the failure of the party holding them (*o*).

If the proceeds of the goods and securities do not equal the amount of the bill, the holders are entitled to prove as creditors for the balance (*p*).

Double insolvency, or rule in *Ex parte Waring*.

ILLUSTRATIONS.

1. The drawer and acceptor of a bill both become bankrupt. The acceptor holds short bills belonging to the drawer as cover for his acceptance. The holder is entitled to the proceeds of these bills when realized (*q*).

2. The drawer of a bill becomes bankrupt. The acceptor dies insolvent. By agreement with the acceptor the drawer holds certain goods as security for the amount of the bill. The holder is entitled to the proceeds of these goods (*r*).

3. The drawer and acceptor of a bill become bankrupt. The acceptor accepted under a guarantee from a bank that the drawer should provide funds to meet the bill and keep him out of cash advance. The holder is not entitled to the benefit of the guarantee (*s*).

4. The drawer and acceptor of a bill become bankrupt. The acceptor holds securities which were deposited by the drawer as security for his current account, before the bill was drawn, and without reference to it. The holder is not entitled to the benefit of those securities (*t*).

5. The drawer and acceptor of a bill, who are distinct firms in India and England respectively, but engaged in a joint adventure, become bankrupt. The bill is drawn specifically against a consignment of goods from the drawer to the acceptor. The holder is entitled to the proceeds of the consignment, subject to claims of the aggregate creditors of the two firms against the aggregate assets (*u*).

6. The drawer and acceptor of a bill become bankrupt, the drawer having sold goods to the acceptor and drawn on him for the price according to agreement. The holder is not entitled to the proceeds of the goods (*x*).

7. The drawer and acceptor of a series of bills become bankrupt. According to the terms of the credit under which the bills

(*o*) *Ex parte Dever, Re Susc* (No. 2) (1885), 14 Q. B. D. 611, C. A.; *aliter*, if realised rightfully or wrongfully; per Brett, M.R., at p. 622.

(*p*) *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430; see at p. 452, and form of order at p. 445; also form of decree in *City Bank v. Luckie* (1870), L. R. 5 Ch. App. at p. 778; *Ex parte Joint Stock Discount Co.* (1875), L. R. 10 Ch. App. 198, reduction of proof. *Quære*, if *Loder's Case* (1868), L. R. 6 Eq. 491, be right?

(*q*) *Ex parte Waring* (1815), 19 Ves. 345.

(*r*) *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430.

(*s*) *Ex parte Stephens* (1868), L. R. 3 Ch. App. 753.

(*t*) *Levi & Co.'s Case* (1869), L. R. 7 Eq. 449.

(*u*) *Ex parte Dewhurst* (1873), L. R. 8 Ch. App. 965; cf. *Ex parte Manchester Bank* (1879), 12 Ch. D. at 779.

(*x*) *Ex parte Lambton* (1875), L. R. 10 Ch. App. 405.

Double insolvency, or rule in *Ex parte Waring*.

are drawn, securities are remitted as cover for specific bills. The bill-holders are entitled to the benefit of the securities which remain unrealized in the hands of the acceptor at the time of his failure. The securities must be appropriated for the benefit of the holder of the bill they were remitted to cover, and not for the benefit of the holders of other bills drawn under the same credit (*y*).

The rule above stated is generally known as the rule or doctrine of *Ex parte Waring*. It has been much misunderstood. The principle on which it is founded is the necessity of working out the equities between the two insolvent estates, each of which has a claim on the goods or securities forming the cover for the bill, which can only be satisfied by the application of the proceeds to meet the bill. It is not founded on, nor does it imply any property or interest in, the goods or securities on the part of the bill-holder. See per Lord Cranworth, and Turner, L.J. (*z*), per Lord Hatherley (*a*), per Lord Cairns (*b*), per James, L.J. (*c*).

The rule in *Ex parte Waring* is a rule *positivi juris*, peculiar to English law. It embodies no universal principle of equity, and does not extend to Scotland (*d*). See the rule criticised by Lord Selborne.

Explanation 1.—Each of the insolvent parties must be liable to the bill-holder in respect of the bill transaction, but it is not necessary that both of them should be liable as parties to the bill (*e*).

ILLUSTRATIONS.

1. A bill is drawn specifically against a consignment of goods. Drawer and drawee both become bankrupt, and the drawee refuses to accept. The holder is not entitled to the proceeds of the goods (*f*).

2. A. in Scotland employs S. as his correspondent at Havannah, and B. as his correspondent in London. A. sends goods to S., and by arrangement between all parties, draws on B. for the price. B. accepts. S. sends remittances in bills to B. to cover his acceptance. S. and B. become bankrupt. A. is entitled to the proceeds of the remittances if he takes up the bill (*g*).

Explanation 2.—It is not necessary that the two insolvent estates should be administered in bankruptcy. It is

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- (*y*) *Ex parte Dever, Re Suse* (No. 2) (1885), 14 Q. B. D. 611, C. A.
 - (*z*) *Powles v. Hargreaves* (1853), 8 De G. M. & G. at 447, 458.
 - (*a*) *City Bank v. Luckie* (1870), L. R. 5 Ch. App. at 776.
 - (*b*) *Banner v. Johnston* (1871), L. R. 5 H. L. at 174.
 - (*c*) *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. at 567.
 - (*d*) *Royal Bank of Scotland v. Commercial Bank* (1882), 7 App. Cas. 366, H. L.
 - (*e*) *Vaughan v. Halliday* (1874), L. R. 9 Ch. App. at 568.
 - (*f*) *Ibid.*
 - (*g*) *Ex parte Smart* (1872), L. R. 8 Ch. App. 220.

sufficient that they are both administered for the benefit of creditors under the control of a court of justice (*h*).

The term generally used is that both insolvent estates must be under a "forced administration" (*i*).

It is possible that where a debtor enters into a composition with his creditors under the Bankruptcy Act, 1883, his estate is sufficiently administered under the control of a court of justice to allow the doctrine of *Ex parte Waring* to apply (*k*). By s. 10 of the Judicature Act, 1875, the bankruptcy rules as to proof, &c. are applied to the winding up of insolvent companies and to the administration of the estates of persons who have died insolvent.

Rights of Surety on Bill.

Rule 8. (1) Where a bill, which was accepted for value, is dishonoured, and the drawer or an indorser is compelled to pay it, he is entitled to the benefit of any securities deposited by the acceptor with the holder to secure the payment of the bill which the holder had in his possession at the time of the dishonour of the bill (*l*).

Right of surety compelled to pay to securities.

When a bill is accepted for value the drawer and indorsers are *quasi* sureties for the acceptor, see *ante*, p. 209. See the limits of the relationship discussed by Lord Blackburn and Lord Watson (*m*). And see the whole subject discussed under the head of Principal and Surety, *ante*, p. 251.

(2) Where an accommodation party is compelled to pay a bill, he is entitled to the benefit of any securities deposited by the person accommodated with the holder as security for the payment of the bill (*n*).

(*h*) *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430, at 451, 458; *Hickie's Case* (1867), L. R. 4 Eq. 226; *Ex parte General South American Co.* (1875), L. R. 10 Ch. App. 635; *Ex parte Gomez* (1875), L. R. 10 Ch. App. at 647, 648.

(*i*) *Ex parte Dever* (No. 2) (1885), 14 Q. B. D. 611, at pp. 621, 625, C. A.

(*k*) Cf. *Ex parte Gomez* (1875), L. R. 10 Ch. App. at 648; and see the status of a composition discussed in *Ex parte Rumboll* (1871), 6 Ch. App. 842, and *Gray v. Megrath* (1874), L. R. 9 C. P. at 230.

(*l*) *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, H. L., overruling C. A.; see *First National Bank v. Word* (1877), 71 New York R. 405; *Aga Ahmed v. Judith Crisp* (1891), 19 Ind. App. 24, P. C. (right of indorser paying note to title deeds deposited with holder).

(*m*) *Duncan, Fox & Co. v. N. & S. Wales Bank*, *supra*, at pp. 19, 22.

(*n*) *Bechervaise v. Lewis* (1872), L. R. 7 C. P. at p. 377, per Willes, J.; *Gray v. Seckham* (1872), L. R. 7 Ch. 680; cf. *Pearl v. Deacon* (1857), 1 De G. & J. 461.

PAYMENT BY BILL, NOTE, OR CHEQUE.

General rule
asto payment.

The general rule of English law is that when a debt becomes due, it is the duty of the debtor, in the absence of any different agreement, to seek out his creditor, if in England, and tender him the exact amount of his debt in cash or other legal tender (*a*).

On the one hand the debtor is under no obligation to honour a bill drawn on him by a creditor, unless he has agreed to do so, *ante*, pp. 207, 294; and on the other hand, the creditor is under no obligation to receive a bill, note, or cheque in discharge of his debt. Consequently an authority to an agent to receive payment of a debt due to his principal is not an authority to receive payment by bill or cheque (*b*). But tender of a *chèque* or other negotiable instrument may be a good tender if the creditor objects only to the *amount*, and not to the *quality* of the tender (*c*).

If an acceptance is to be taken in payment for goods or discharge of a debt it is the duty of the creditor to draw a bill on a proper stamp and present it for acceptance (*d*).

Where, however, a creditor has taken a bill, note, or

(*a*) Cf. *Fessard v. Mugnier* (1865), 34 L. J. C. P. 126; *Bradford Old Bank v. Sutcliffe* (1918), 24 Com. Cas. at pp. 30, 37, C. A. As to requiring change, see *Robinson v. Cook* (1815), 6 Taunt. 336, and cf. *Dean v. James* (1833), 4 B. & Ad. 546. As to legal tender in coin, see the Coinage Act, 1870 (33 & 34 Vict. c. 10). As to payment *post diem*, see *Beaumont v. Greathead* (1846), 2 C. B. 494. As to Treasury notes, see *post*, p. 379.

(*b*) *Williams v. Evans* (1866), L. R. 1 Q. B. 352 (auctioneer); *Blumberg v. Life Interests Corporation*, (1896) 1 Ch. 171; affirmed, (1897) 1 Ch. 27, C. A. (solicitor).

(*c*) *Polglass v. Oliver* (1831), 2 Cr. & J. 15; *Caine v. Coulton* (1863), 1 H. & C. 764 (bank post bill). See, too, as to a cheque, *Papè v. Westacott*, (1894) 1 Q. B. 272, C. A.; *Meyer v. Sze Hai Banking Co.*, (1913) A. C. 847, P. C. (cheque given by bank in exchange for money paid in).

(*d*) Cf. *Bullen and Leake*, *Precedents of Pleading*, ed. 7, p. 670.

cheque from his debtor various questions may arise as to the effect of the transaction.

Where a bill or note is given by a debtor to his creditor it may be given either by way of payment or as collateral security, the presumption being in favour of payment (*e*). If it is given by way of collateral security it does not suspend the creditor's right to sue for his debt, but the creditor must use due diligence to collect it and give notice of dishonour, if necessary, otherwise it may be treated as so much money in his hands (*f*).

Collateral security.

Where a bill or note is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment (*g*). It is immaterial whether the instrument is payable on demand or at a future time. "The title of a creditor," says Lush, J., "to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person" (*h*).

Conditional payment.

In some American States, for instance, Massachusetts

(*e*) *Re Boys* (1870), L. R. 10 Eq. 467; cf. *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

(*f*) *Peacock v. Purssell* (1863), 32 L. J. C. P. 266.

(*g*) Cf. *Maillard v. Argyle* (1843), 6 M. & Gr. 40; *Leake v. Young* (1856), 25 L. J. Q. B. 266; *Bottomley v. Nuttall* (1858), 28 L. J. C. P. 110.

(*h*) *Currie v. Misa* (1875), L. R. 10 Eq. 153, at p. 163, Ex. Ch.; see *Crowe v. Clay* (1854), 9 Exch. 604, at p. 608, Ex. Ch.; *Marreco v. Richardson*, (1908) 2 K. B. at p. 592, C. A.; cf. *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 38, as to revival of vendor's lien.

and Vermont, the common law presumption is reversed, and a bill or note is *primâ facie* deemed to have been taken as absolute and not as conditional payment; but in most States the English rule prevails (*i*).

The effect of a bill or note as conditional payment may be illustrated by the contract of sale. If a bill be taken for the price of goods sold, the seller's lien is gone during the currency of the bill, but revives on its actual or practical dishonour. Thus, in *Gunn v. Bolckow, Vaughan & Co.*, where iron rails were sold to be paid for by buyer's acceptances of seller's drafts against wharfinger's certificates, it was held that the giving of the acceptances was not an absolute payment, but conditional on the acceptances being met, and that upon the insolvency of the acceptors the seller's lien on the goods revived, and the fact that the sellers had negotiated the bills made no difference. "No doubt," says Mellish, L.J., "if the buyer does not become insolvent then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser" (*k*). Though the bills had been discounted, the seller was liable on them, with recourse over only against the insolvent buyer, otherwise the fact that the bills were in the hands of third parties would have been material (*l*). Where the seller of goods took the buyer's acceptance and then indorsed the bill to a third person and the bill

(*i*) *Story on Sale*, § 219.

(*k*) *Gunn v. Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. App. 491, at p. 501; and see *Sale of Goods Act*, 1893, s. 38.

(*l*) *National Savings Bank v. Tranah* (1867), L. R. 2 C. P. 556. A vendor's lien on real estate does not seem to be waived by taking a bill or note. *Ex parte Loaring* (1814), 2 Rose, 79.

was dishonoured, it was held that he could not sue the buyer for the price while the bill was outstanding in the hands of a third person, even though he got it back before the action came on for hearing (*m*).

Again, where a cheque was given in part payment of a debt, it was held that, as regards the balance of the debt, the Statute of Limitations began to run from the time when the cheque was given, and not from the time when it was paid (*n*). And where a bill broker pledged negotiable securities with a bank, and the bank released the securities to the bill broker on receiving his cheque, it was held that the securities were not impressed with any trust in favour of the bank if the cheque was dishonoured (*o*). The fact that a solicitor has taken a bill in respect of his bill of costs does not prevent the bill of costs from being liable to taxation (*p*).

When the bill or note is dishonoured it seems that the debt which was conditionally paid may be treated as subsisting throughout. Thus, where a debtor had given his creditor a cheque, but on the debt being garnisheed, stopped the cheque, it was held that there was a good subsisting debt which could be garnisheed (*q*). Conversely, when the bill or note is duly honoured, the payment dates from the date of the receipt of the bill or note (*r*).

There is, however, a qualification of the rule that a bill or note operates as conditional payment in the case where the creditor already possesses a higher remedy. Creditor holding higher security.

(*m*) *Davis v. Reilly*, (1898) 1 Q. B. 1; followed *Re A Debtor*, (1908) 1 K. B. 344, 350, C. A. (bankruptcy notice).

(*n*) *Marreco v. Richardson*, (1908) 2 K. B. 592, C. A.

(*o*) *Lloyds Bank v. Swiss Bankverein* (1912), 18 Com. Cas. 79, C. A.

(*p*) *Re Romer*, (1893) 2 Q. B. 286, at p. 300, C. A.

(*q*) *Cohen v. Hale* (1878), 3 Q. B. D. 371; *Loughman v. Barry* (1858), 6 Ir. R. C. L. 457; cf. *Re London and Birmingham Bank* (1865), 34 L. J. Ch. 418, as to the effect of a renewal bill on a banker's lien, *sed qu.*?

(*r*) *Hadley Felix v. Hadley*, (1898) 2 Ch. 680; *Marreco v. Richardson*, (1908) 2 K. B. at p. 592, C. A.

In *Belshaw v. Bush* (s), where it was held that the acceptance of a third person operated as a conditional payment, Maule, J., says: "The cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, where, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis v. Gyde* (t), in which the debt being for rent, the plaintiff would part with a remedy by distress; and, as in *Worthington v. Wigley* (u), where the demand being on a bond the plaintiff might in certain events have recourse to other funds than he could in an action on a simple contract." Again, as Warrington, J., says, "the mere giving of a cheque is not conditional payment of a secured debt, so as to release the security" (x).

It has also been held that a promissory note, payable by instalments, given contemporaneously to the holder of a bill of sale to secure the same debt, and with a proviso that on default of payment of any instalment the whole is to become due, constitutes a defeasance of the bill of sale

(s) *Belshaw v. Bush* (1851), 11 C. B. 191, at p. 206; cited and approved, *Henderson v. Arthur*, (1907) 1 K. B. 10, at p. 13, C. A. (rent).

(t) *Davis v. Gyde* (1835), 2 A. & E. 623. Held on demurrer that a note given and received for rent does not extinguish the claim for rent which is a debt of a higher degree, and that if such note be pleaded in bar to an avowry it must be shown that the note was accepted in satisfaction, or that by special circumstances or other circumstances pleaded, it suspended the right of distress. But an agreement to take the note as conditional payment will be inferred from very slight evidence, *Palmer v. Bramley*, (1895) 2 Q. B. 405, C. A.

(u) *Worthington v. Wigley* (1836), 3 Scott, 558. Held, that a plea of part payment, or the delivery of bills in satisfaction of a bond, after the day on which the money was by the condition made payable is bad on general demurrer. Cf. *Drake v. Mitchell* (1803), 3 East, 251, as commented on in *Re Davison* (1884), 13 Q. B. D. 50, at p. 54, and *Wegg Prosser v. Evans*, (1895) 1 Q. B. 108, C. A., where it was held that an unsatisfied judgment against a joint contractor on a cheque was no bar to an action on the original consideration against the other joint contractor.

(x) *Re Defries*, (1909) 2 Ch. at p. 428 (specialty debt).

within sect. 10 of the Bills of Sale Act, 1878 (*y*). And in *Ex parte Matthew*, it was held that when a judgment creditor had issued a bankruptcy note, but afterwards took the debtor's promissory note, he could not, during the currency of the note, obtain a receiving order; for the note, till dishonoured, must be treated as payment (*z*).

If a bill or note be taken by a creditor as conditional payment, and he is guilty of laches in respect of it, the bill or note is then treated as absolute payment, and as between debtor and creditor the debt is discharged. Effect of laches.

Thus, if a bill be indorsed on account of a debt and dishonoured, and the holder omits to give notice of dishonour to the indorser, he cannot sue him for the debt any more than on the bill (*a*); and where a creditor took the cheque of his debtor's agent, and was an unreasonable time in presenting it, whereby his debtor's position was altered, it was held, that, as against the debtor, the cheque must be treated as absolute payment (*b*).

So, too, it was held at common law that if the creditor lost a negotiable bill which he had taken as conditional payment, he was deprived of his remedies, both on the bill and on the consideration, for, "if the bill be lost the condition on which payment may be defeated does not arise" (*c*). But the rigour of the common law is now abated by sects. 69 and 70 of the Bills of Exchange Act, *ante*, p. 267, which authorise application for a new bill or an action on the lost bill.

The question of liability on the consideration, where

(*y*) *Counsell v. Lond. & West. Discount Co.* (1887), 19 Q. B. D. 512, C. A.

(*z*) *Ex parte Matthew* (1884), 12 Q. B. D. 506, C. A.; cf. *Re A Debtor*, (1908) 1 K. B. 344, C. A.

(*a*) *Bridges v. Berry* (1810), 3 Taunt. 170; cf. *Smith v. Mercer* (1867), L. R. 3 Ex. 51, as to an "approved bill" given without indorsement. But see next page.

(*b*) *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; as to payments by country bank notes, see *Lichfield Union v. Greene* (1857), 26 L. J. Ex. 141.

(*c*) *Crowe v. Clay* (1854), 9 Exch. 604, at p. 608, Ex. Ch., action for price of goods sold and on bill.

the party liable is discharged by the holder's laches from liability on the bill, was much discussed at the Hague Conferences, because under the continental systems the holder's duties are absolute duties, and not, as in England, duties to use reasonable diligence. The universal foreign opinion appeared to be that the party liable on the consideration was only discharged if and in so far as he could prove actual damage resulting from the holder's laches. The English cases seem to assume that the party liable on the consideration is discharged irrespective of damage, see authorities cited *ante*, p. 227. But it is to be noted (a) that the question has not been argued before a court of appeal; (b) that in the cases there was always some evidence of actual damage; and (c) that there has been no decision on an unaccepted bill. Suppose D. sells a motor-car to A. for 500*l.* A. pays for it by a bill drawn on B. in favour of D. B. refuses to accept, and by some mistake D., the seller, gives notice to A., the buyer, two days late. Can A. keep the motor-car without paying for it? D. has only a piece of paper on which no one is liable.

Absolute
payment.

Though the general effect of giving and taking a bill or note is that the debt is conditionally paid, there is nothing to prevent its being given and taken as absolute payment if the parties so intend (*d*), that is to say, the creditor may receive the bill or note in absolute discharge of the debt, trusting solely to his remedies on the instrument. It is a question of fact what the intention of the parties was (*e*). For instance, the creditor may be offered cash, but may prefer to take a bill instead (*f*). Where the debtor is not a party to the instrument, perhaps the inference of absolute payment more readily arises (*g*).

(*d*) *Benjamin on Sales*, 4th ed. p. 732; *Cowasjee v. Thompson* (1845), 5 Moore, P. C. 165; cf. *Sard v. Rhodes* (1836), 1 M. & W. 153; *Sibree v. Tripp* (1846), 15 M. & W. 23.

(*e*) *Goldshede v. Cottrell* (1836), 2 M. & W. 20.

(*f*) *Anderson v. Hillies* (1852), 12 C. B. 499, and cases there cited.

(*g*) Cf. *Camidge v. Allenby* (1827), 6 B. & C. 373, at p. 384 (country bank notes); *Smith v. Mercer* (1867), L. R. 3 Ex. 51

Where there is a disputed liability, it may be compromised by the payment of a lesser sum than that claimed, but the general rule of law is that where a liquidated sum is due, it cannot be discharged by the payment of a smaller amount, for there is no consideration for the creditor's promise to forego the balance (*h*). But by a curious refinement on this rule, it has been held that a liquidated debt may be discharged by the acceptance in satisfaction of a negotiable security for a lesser sum, even if the debtor himself be the only person liable on the instrument (*i*).

Payment by negotiable security for lesser sum.

There must, however, be an acceptance in satisfaction. If a cheque for a smaller sum be sent in settlement of a larger sum, the creditor can refuse to receive the cheque in satisfaction, even though he does not return it, and he may then sue for the balance. In a case where the debtor sent his own cheque in settlement of a claim for damages for breach of contract, and the creditor retained the cheque, sending back a receipt on account, Bowen, L.J., says: "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent" (*k*). But transactions with a third party stand on a different footing. Thus where a father sent a cheque for a smaller sum to settle a debt incurred by his son, it was held that the creditor must

Cheque sent in settlement received on account.

(approved bills), where absolute payment was suggested as an alternative; and see *ante*, p. 224.

(*h*) *Foakes v. Beer* (1884), 9 App. Cas. 605, H. L. See notes to *Cumber v. Wane*, 1 Smith, L. C. ed. 12, p. 376.

(*i*) *Sibree v. Tripp* (1846), 15 M. & W. 23 (promissory note of the debtor); *Curtlewis v. Clarke* (1849), 3 Exch. 375 (acceptance of third person); *Goddard v. O'Brien* (1882), 9 Q. B. D. 37 (debtor's own cheque); *Bidder v. Bridges* (1887), 37 Ch. D. 406, C. A. (cheque of debtor's solicitor).

(*k*) *Day v. McLea* (1889), 22 Q. B. D. 610, C. A. at p. 613.

either return the cheque or keep it in satisfaction of the debt (*l*).

Bill or note
as evidence
of debt.

When an action is brought by the holder of a dishonoured bill, note, or cheque against an immediate party liable thereon (*m*), he may sue on the consideration as well as on the instrument, and use the instrument as evidence.

Thus in an action on the money counts, where the plaintiff was both drawer and payee of the bill, and the acceptor was the defendant, it was held that the bill was evidence that the defendant was indebted to the plaintiff in the amount of the bill (*n*). *Aliter*, if drawer and payee were different persons, for then the *primâ facie* presumption would be that the acceptor owed the money to the drawer and not to the payee (*o*). Where an action for money lent was brought on a conditional note by payee against maker, it was held the instrument was no evidence of money lent. "An ordinary promissory note," says Bayley, B., "is evidence of money lent as between the payee and the maker, but then it must be a promissory note payable at all events" (*p*). In 1844 defendant gave plaintiff a note for 23*l*., which was expressed to be for interest to date on a note for 117*l*. In an action on an account stated, this was held to be evidence of a subsisting debt of 117*l*. in 1844 (*q*).

In an action by a special indorsee against his indorser, the bill or note, perhaps, is not sufficient evidence, because presentment and notice of dishonour are ordinarily conditions precedent to liability (*r*), but if those conditions are

(*l*) *Hirachand v. Temple*, (1911) 2 K. B. 330, C. A., doubting *Goddard v. O'Brien*, *supra*.

(*m*) As to immediate and remote parties, see *ante*, p. 111.

(*n*) *Thompson v. Morgan* (1811), 3 Camp. 101; cf. *Rhodes v. Gent* (1821), 5 B. & Ald. 244, at p. 245, as to account stated.

(*o*) *Early v. Bowman* (1831), 1 B. & Ad. 889.

(*p*) *Morgan v. Jones* (1830), 1 Cr. & J. 162, at p. 167; cf. *Fryer v. Rowe* (1852), 12 C. B. 437 (account stated).

(*q*) *Perry v. Slade* (1845), 8 Q. B. 115.

(*r*) *Burgh v. Legge* (1839), 5 M. & W. 418; cf. *Jardine v. Payne* (1831), 1 B. & Ad. 663, unstamped bill.

fulfilled, the instrument is *primâ facie* evidence of the debt (*s*). If the indorsement were in blank, the instrument of itself would be no evidence that the indorser was indebted to the holder (*t*), for obviously the holder might be the third or fourth bearer to whom it had been transferred.

Where a creditor expressly or impliedly authorises his debtor to discharge his debt by posting a bill or cheque to him, the posting of the letter containing the bill or cheque operates as a delivery thereof to the creditor, and if the bill or cheque is lost or stolen the creditor takes the risk. Thus if a cheque is sent by post in reply to a letter requesting payment of a debt, and the cheque is stolen and cashed by the thief, the debt is deemed to have been paid (*u*). Of course, if the cheque is not cashed, and does not get into the hands of a holder in due course, the creditor can avail himself of the remedies given by sects. 69 and 70 of the Act, *ante*. It is now the custom to remit money by crossed cheque, and not by sending Treasury notes through the post (*x*).

(*s*) *Burmester v. Hogarth* (1843), 11 M. & W. 97, at p. 101; cf. *Watkins v. Wake* (1841), 7 M. & W. 488.

(*t*) *Ibid.*

(*u*) *Norman v. Ricketts* (1886), 3 T. L. R. 186, C. A.; *Thairlwall v. Great Western Railway*, (1910) 2 K. B. 509; and see notes to sect. 21.

(*x*) *Mitchell Henry v. Norwich Union* (1917), 34 T. L. R. 77.

NEGOTIABLE SECURITIES FOR MONEY.

Negotiable
securities for
money.

The law relating to negotiable securities for money, other than bills, notes, and cheques, is as yet very imperfectly developed, and is, therefore, unsuited for presentation in a codified form. The best plan seems to be to note the main decisions on each class of instrument which either is, or has been sought to be treated as, negotiable. The history of the doctrine of negotiability up to 1875 is exhaustively traced in the judgment of the Exchequer Chamber in *Goodwin v. Robarts* (a). The case is of great importance as showing the progressive character of the law, so that instruments which at one time are not negotiable may, by the usage of the English money market, afterwards become so (b).

The tests of negotiability are thus stated by Blackburn, J., who says: "It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a '*negotiable instrument*,' and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.*, if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it

(a) *Goodwin v. Robarts* (1875), L. R. 10 Ex. 337; affirmed, 1 App. Cas. 476 (foreign scrip). See an article on negotiability and estoppel, by Ewart, *Law Quarterly Review*, April, 1900, p. 135.

(b) Compare the gradual rise of a quasi-negotiability in documents of title to goods as shown by the successive Factors Acts. See *Chalmers' Sale of Goods Act*, 6th ed. p. 132.

incapable of being put in suit by the party holding it *pro tempore*, it is not a 'negotiable instrument,' nor will delivery of it pass the property in it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt" (c).

This statement appears to require qualification in two respects, for first, an instrument, not otherwise negotiable, may be made negotiable by statute; and secondly, foreign government bonds to bearer may undoubtedly be negotiable, yet the holder cannot sue the foreign government upon them in the Courts of this country; but the explanation may be that the exemption of a foreign government from suit in this country is a personal exemption, and does not arise out of any defect of title on the part of the holder.

As regards instruments which are "accustomably transferable," it is to be noted that the quality of negotiability is an incident annexed by the usage of the English money market, and is not determined by the law of the place of issue (d).

The issue of bank notes is subject to certain statutory restrictions for the protection of the limited monopoly given to the Bank of England, *ante*, p. 74, and for stamp purposes they are also subject to special regulations, *post*, p. 396. But as regards negotiability, bank notes are on the same footing as other promissory notes payable to bearer on demand. This has been unquestioned law since the leading case of *Miller v. Race* (e), decided in 1791, where Lord Mansfield says that bank

(c) *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. 373, at p. 381, citing the notes to *Miller v. Race*, 1 Smith's L. C. ed. 12, p. 525; cf. *Simmons v. London Joint Stock Bank*, (1891) 1 Ch. 270, at p. 294, per Bowen, L.J., and on appeal, per Ld. Herschell, (1892) A. C. at p. 215.

(d) *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, C. A. (Prussian bonds); cf. *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; and in Court below, 38 Ch. D. at p. 404.

(e) *Miller v. Race* (1791), 1 Burr. 452; 1 Smith's L. C. 9th ed. p. 491, and notes.

Bank notes. notes "are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. . . . It has been quaintly said that the reason why money cannot be followed is because it has no earmark, but this is not true. The true reason is, upon the account of the currency of it, it cannot be recovered after it has passed in currency." Thus, where a money-changer in Paris, twelve months after he had received notice of a robbery of bank-notes at Liverpool, changed one of the stolen notes in Paris for a stranger, whom he merely required to produce his passport and write his name on the note, it was held that he got a good title, and the fact that he forgot to consult the notice was not evidence of fraud or notice, which alone could affect his title (*f*).

Bank post bills.

Bank post bills are mainly used for transmitting money from one branch of a bank to another. They are negotiable instruments, and are usually drawn at seven days or other short date after sight (*g*).

Foreign bonds to bearer.

In *Glyn v. Baker*, in 1811, East India bonds belonging to the defendant were misappropriated by his bankers, who replaced them with bonds belonging to the plaintiff. The bonds were not in terms negotiable, though they were indorsed in blank by the payee. It was held that they were not negotiable, and that the defendant could not retain the substituted bonds as against the plaintiff (*h*). But, as was pointed out in *Goodwin v. Roberts*, "the inconvenience which would have arisen from this decision was remedied by the immediate passing of the East India Company Bonds Act, 1811 (51 Geo. 3, c. 64),

(*f*) *Raphael v. Bank of England* (1855), 17 C. B. 161.

(*g*) *Forbes v. Marshall* (1855), 24 L. J. Ex. 305 (where form is given); cf. *Willis v. Bank of England* (1835), 4 A. & E. 21; *Hart on Banking*, p. 534. As to bank post bills issued by Bank of England and in Scotland, see 5 Geo. 3, c. 49.

(*h*) *Glyn v. Baker* (1811), 13 East, 509.

by which bonds of the East India Company were made transferable by delivery" (i). Foreign bonds to bearer.

In *Gorgier v. Mieville*, in 1824, Prussian Government bonds, payable to bearer, were wrongfully pledged by the plaintiff's agent. On proof that these bonds were treated as negotiable in the London money market, it was held that the plaintiff could not recover them from the pledgee, who had acted in good faith (k). This case has been frequently approved and followed.

In *Lang v. Smyth*, in 1831, Neapolitan obligations to bearer called "Bordereaux" were issued with coupons attached. The plaintiff's agent wrongfully pledged the bonds without the coupons, and the jury found that the bonds were not negotiable without the coupons. It was held that the plaintiff could recover the bonds (l).

In *Att.-Gen. v. Bouwens*, in 1838, the question was, whether probate duty was payable on certain Russian and Danish bonds to bearer. On proof that the bonds were treated as negotiable in the English market, it was held that they were negotiable instruments constituting assets in England. "All these instruments," says Lord Abinger, "have been clearly framed with a view to their becoming subjects of sale, and easily transmissible from hand to hand" (m).

In *Picker v. London and County Bank*, in 1887, Prussian bonds were stolen from the plaintiff and pledged with the defendants. The bonds were issued with detached coupons. It was proved that the bonds were treated in Prussia as payable to bearer and negotiable by delivery apart from the coupons. But there was no evidence that

(i) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, at p. 354.

(k) *Gorgier v. Mieville* (1824), 3 B. & C. 45.

(l) *Lang v. Smyth* (1831), 7 Bing. 284, as explained, *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, at p. 356.

(m) *Att.-Gen. v. Bouwens* (1838), 4 M. & W. 171, at p. 190; cf. *Heseltine v. Siggers* (1848), 1 Exch. 856, where Spanish stock was held to be negotiable, and therefore not within the 17th section of the Statute of Frauds.

Foreign bonds
to bearer.

they were so treated in the English money market. Held that they were not negotiable, and that the plaintiff could recover them. "If," says Lord Esher, "all that can be proved is that by the law or custom in Prussia the instrument is negotiable, then the answer is that an English Court and English merchants are not bound by a law or custom of trade in Prussia. To prove that an instrument is negotiable in the sense required there must be something to make it so by English law" (n).

In *London and County Bank v. River Plate Bank*, in 1888, negotiable foreign bonds were stolen from the defendants by their manager and pledged with the plaintiffs. Subsequently the manager by fraud obtained the bonds, or bonds of a like character, back from the plaintiffs, and restored them to the defendants. Held, that the defendants were entitled to retain the bonds so restored (o).

In *Sheffield v. London Joint Stock Bank*, in 1888, M., a money-dealer, made an advance on certain negotiable bonds and other securities belonging to S. The money-dealer deposited them and other securities with the bank to secure a large running account, and then became bankrupt. The bank claimed to retain the securities belonging to S. against the general balance due from the money-dealer. It was held that the bank could not do so, whether the securities were negotiable or not, for they had notice that the securities were not the money-dealer's property. S., therefore, was entitled to redeem his securities on paying the bank the amount he owed the money-dealer. "He was a money-dealer," says Lord Macnaghten, "he lent money to customers on securities which they deposited with him. He pledged those securities

(n) *Picker v. London and County Bank* (1887), 18 Q. B. D. 515, at p. 518, C. A.; approved, *Williams v. Colonial Bank* (1888), 38 Ch. D. at p. 404, C. A.; and *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, at p. 297, per Hamilton, J.

(o) *London and County Bank v. River Plate Bank* (1888), 21 Q. B. D. 535, C. A.; affirming S. C., 20 Q. B. D. 232.

to the banks who supplied him with the money. The banks knew that in most cases, if not in all, the securities which he deposited with them were not his own absolute property. That information was conveyed by the nature and extent of his business" (p).

In *London Joint Stock Bank v. Simmons*, in 1892, plaintiff deposited with his stockbroker, for safe custody, certain Cedula bonds which were payable to bearer. The broker wrongfully sold the plaintiff's bonds, but purchased others of the same kind, and entered them in his books in the plaintiff's name, thus replacing what he had taken. Afterwards he pledged the new bonds *en bloc* with securities belonging to other customers with the defendant bank to secure an advance to himself. Held, that the bank was entitled to retain the bonds against the advance, it being a pledgee for value and in good faith of negotiable instruments (q).

In *Venables v. Baring Brothers*, in 1892, American railway bearer bonds were stolen from the defendants. The loss of the bonds was duly advertised. The plaintiffs were French bankers who, in good faith, had made advances to a customer on the bonds. Held, that the plaintiffs had a good title to the bonds and the interest due on them, as, at the time when they took them, they had no notice of the theft (r).

In *Edelstein v. Schuler & Co.*, in 1902, American rail-

(p) *Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333; reversing the decision of court below reported as *Easton v. London Joint Stock Bank* (1886), 34 Ch. D. 95, C. A. Having regard to the next case, this decision must be regarded as a finding on the particular facts, and not as laying down any general principle.

(q) *London Joint Stock Bank v. Simmons*, (1892) A. C. 201, reversing the Court of Appeal, (1891) 1 Ch. 271. Cf. *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120 (negotiable securities lodged with stockbroker, who pledges them with his bankers); *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, affirmed, 18 Com. Cas. 79, C. A. (negotiable securities wrongly pledged, return of equivalent but not identical securities).

(r) *Venables v. Baring Brothers*, (1892) 3 Ch. 527.

way bonds payable to the bearer, or, in case of registration, to the registered holder, were stolen by the plaintiff's clerk, and sold by him on the Stock Exchange. It was held that these were negotiable instruments, and that the price of the bonds could not be recovered from the stockbroker, who took them in good faith, and disposed of them on the Stock Exchange (s).

As to United States municipal and corporation bonds, see *Daniel* on Negotiable Instruments, Chap. XLVIII.

Non-liability
of foreign
government
and its agents.

In *Twycross v. Dreyfus*, in 1877, bonds were issued by the Peruvian Government through Dreyfus Brothers, its English agents, and the surplus imports of guano were stated to be hypothecated for the payment of the bonds. It was held that no action could be maintained in respect of the bonds or the guano received by Dreyfus Brothers. "The municipal law of this country," says Jessel, M. R., "does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour" (t); and James, L. J., adds, "You cannot sue the Peruvian government, and it would be a monstrous assumption of jurisdiction to endeavour to sue a foreign government indirectly, by making its agents in this country defendants, and then saying you have got the money of the government, and you ought to apply that" (u).

Circular
notes.

Circular notes are negotiable instruments. In a case in 1867, where the law and practice respecting them was fully discussed, the plaintiff's agent remitted to him the letter of indication and notes by post. The notes were lost, and it was held that the issuing banker could debit

(s) *Edelstein v. Schuler & Co.*, (1902) 2 K. B. 144.

(t) *Twycross v. Dreyfus* (1877), 5 Ch. D. 605, C. A., see at p. 616; and cf. *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176.

(u) *Twycross v. Dreyfus*, *supra*, at p. 618. See further as to the non-liability of the English agent issuing the bonds, *Goodwin v. Robarts* (1875), L. R. 10 Ex. 337, at p. 344.

his account with the amount of the notes, unless he offered a proper indemnity. The Court there say: "Upon the true construction of the letter of indication and circular notes, it is not obligatory upon the holder to cash the circular notes, though he purchases the right to do so. In the event of his not requiring to use them abroad, he may, after reasonable notice of his electing not to use them, require repayment at the banker's hands. . . . The correspondent who cashes a circular note ought to, and commonly does, for his own protection, look at the letter of indication, for the purpose of identifying the holder of the circular note; but his doing so is not made a condition precedent. If he cashes the circular note for the person mentioned in the letter of indication, he has recourse against the banker, although from civility, over-confidence, or mere omission, he may not have asked for the letter of indication. And, on the other hand, if after the letter of indication has been properly filled in by the rightful owner with his signature, a foreign correspondent cashes a circular note for a thief, who has succeeded in stealing the letter of indication and circular note, and in forging the name of the holder, no care in looking at the letter of indication can eke out a right to recover against the banker, as upon a payment to the right person" (x).

The term "debenture" is a term of uncertain extension (y). "You may," says Lindley, L.J., "have mortgage debentures which are charges of some kind on property—you may have debentures which are bonds; and if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness" (z).

Debentures.

(x) *Conflans Quarry Co. v. Parker* (1867), L. R. 3 C. P. 1; see pp. 10 and 12. See further *Paget on Banking*, ed. 2, p. 66.

(y) *Buckley on the Companies Acts*, 5th ed. p. 159.

(z) *British India Steam Co. v. Inland Revenue* (1881), 7 Q. B. D. 165, at p. 172, where the question at issue was the stamp; cf. *Edmonds v. Blaina Co.* (1887), 36 Ch. D. at p. 218; *English Investment Co. v. Brunton*, (1892) 2 Q. B. at p. 712, C. A.

Debentures.

Two points seem pretty clear. First, when a money obligation, bearing the name of a debenture, is issued by a company, it may be stamped as a debenture, though by reason of its form it might also fall under some other stamp definition (*a*). Secondly, if an instrument issued as a debenture, is in substance a promissory note within the definition given by sect. 83 of the Act, any objection to its negotiability which could formerly have been urged by reason of its being under seal, appears now to be removed by sect. 91 (2) of the Act, *ante*, p. 324.

. *Primâ facie* no doubt a debenture is not a negotiable instrument, and is only assignable in like manner and subject to the like conditions as an ordinary chose in action; but the question must be determined by reference to the form of the particular instrument, the usage of the money market, and the facts of the particular case. It is to be noted that though an instrument may not be negotiable in the proper sense of the term, it may have a quasi negotiability by estoppel, that is to say, particular parties may be precluded from denying it the qualities of negotiability in particular cases.

In *Re Blakely Ordnance Co.*, in 1867, pursuant to an antecedent contract with D., debentures were issued by the company payable to "D. or the bearer hereof," and were transferred for value. It was held that, though the holder might not be able to sue in his own name, he might prove in the winding-up in his own name, without reference to any equities between the company and D., the company being estopped by the form of the instrument (*b*).

In *Re Natal Investment Co.*, in 1868, debentures were issued by the company payable to "C., his executors or assigns, or the holder for the time being of this debenture

(*a*) *British India Steam Co. v. Inland Revenue* (1881), 7 Q. B. D. 165.

(*b*) *Re Blakely Ordnance Co.* (1867), L. R. 3 Ch. App. 154.

bond," and were transferred for value. It was held that the case was distinguishable from the last one by the different circumstances under which the debentures were issued, and that the holder could only prove in the winding-up subject to any equities between C. and the company (c). Debentures.

In *Re General Estates Co.*, in 1868, the company issued debenture bonds payable to C. or order, which were indorsed by him for value. It was held that as the company had power to issue negotiable instruments, the indorsee could prove in the winding-up without reference to any equities between the company and C., and *semble*, that the instruments were promissory notes (d).

In *Re Imperial Land Co.*, in 1870, a company issued debenture bonds payable to bearer which were afterwards sold in the open market. It was held by Malins, V.-C., that these instruments were on the footing of promissory notes, and that the holders could prove in the winding-up without reference to any equities between the company and the person to whom they were issued (e).

In *Webb v. Herne Bay Commissioners*, in 1870, assignable debentures (form not given) were issued by the commissioners which purported to have been executed pursuant to statutory powers, and it was held that the commissioners were estopped from alleging that the debentures were issued in contravention of their statutory powers, and that a mandamus could issue to compel them to pay the interest on the debentures (f).

In *Crouch v. Crédit Foncier*, in 1873, the company issued debentures payable to bearer, subject to conditions as to drawings, indorsed on the back. Some of these

(c) *Re Natal Investment Co.* (1868), L. R. 3 Ch. App. 355, see at p. 358.

(d) *Re General Estates Co., Ex parte City Bank* (1868), L. R. 3 Ch. App. 758, see at p. 762, explaining the last case.

(e) *Re Imperial Land Co. of Marseilles, Ex parte Colborne* (1870), L. R. 11 Eq. 478.

(f) *Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642.

Debentures. debentures were stolen, and afterwards purchased by the plaintiff, who acted in good faith. The plaintiff sued the company, who declined to pay, as they had notice of the robbery. It was admitted that similar instruments had been treated as negotiable. It was held that the usage did not make these instruments negotiable, as being contrary to general law, and it was doubted whether an instrument under seal could be a promissory note (*g*). This case was doubted in *Goodwin v. Robarts*, in 1875, where the Court say that the case might be supported "on the ground that there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been sufficient ground for refusing to give effect to it that it did not form part of what is called the ancient law merchant" (*h*).

In *Re Romford Canal Co.*, in 1883, the company issued assignable debentures (form not given). Some were transferred for value to C., and others were deposited with D. Held, that C. could prove without reference to equities between the company and the person to whom the debentures were issued, but that D. took only as an equitable assignee, and could only prove for the amount he had advanced. Kay, J., reviews the previous cases and sums up their effect as follows: "Where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia ritè esse acta*. If such security be legally transferable, such an irregularity, and, *à fortiori*, any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice; nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the

(*g*) *Crouch v. Crédit Foncier* (1873), L. R. 8 Q. B. 374.

(*h*) *Goodwin v. Robarts* (1875), L. R. 10 Ex. 337, at p. 356, Ex. Ch.

company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity" (*i*). Debentures.

In *Bechuanaland Exploration Co. v. London Trading Bank*, in 1898, the plaintiffs held certain bearer debentures issued by an English company. The plaintiffs' secretary stole the debentures, and pledged them with the defendant bank for advances made. The defendants received the debentures in good faith, and it was shown that by the usage of the money market such debentures were treated as negotiable by delivery. It was held that the debentures were negotiable by custom, and that the defendants were entitled to retain them (*k*).

This case was followed in 1902 in *Edelstein v. Schuler & Co.*, where it was further held that the usage to treat these instruments as negotiable had been so often established that it was no longer necessary to prove it in evidence (*l*).

By sect. 106 of the Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), a doubt is removed as to the validity of debentures to bearer issued in Scotland, and they are declared to be valid and binding according to their terms.

A banker's deposit note or receipt is not a negotiable instrument (*m*). Deposit notes.

In *Partridge v. Bank of England*, in 1846, dividend warrants payable to J. P., without the addition of the words "order" or "bearer," were held not to be negotiable, although they bore J. P.'s receipt, and it was the practice of bankers to treat them as negotiable (*n*). This Dividend warrants.

(*i*) *Re Romford Canal Co.* (1883), 24 Ch. D. 85, at p. 92.

(*k*) *Bechuanaland Exploration Co. v. London Trading Bank, Ltd.*, (1898) 2 Q. B. 658.

(*l*) *Edelstein v. Schuler & Co.*, (1902) 2 K. B. 144.

(*m*) *Clegg v. Burnett* (1887), 56 L. T. 775; as to deposit note with cheque form on back, see *Re Dillon* (1890), 44 Ch. D. 76; and cf. *Beaulerk v. Greaves* (1886), 2 Times L. R. 837, receipt for bonds, and *Hart on Banking*, pp. 537—545. As to assignment of beneficial interest by surrender and taking out a new deposit note in name of assignee, see *McEneaney v. Shelvin* (1912) 1 Ir. Rep. 278, C. A.

(*n*) *Partridge v. Bank of England* (1846), 9 Q. B. 396, Ex. Ch.

Dividend
warrants.

case has since been doubted (o). And now by sect. 8 of the Act, *ante*, p. 28, instruments within the Act are negotiable unless they contain words prohibiting transfer. Apart from some peculiarity in the form of the particular instrument (p), a dividend warrant is practically an ordinary cheque. By sect. 97 (3) (d), *ante*, nothing in the Act is to affect "the validity of any usage relating to dividend warrants or the indorsement thereof." This enactment was probably intended to protect the usage of paying dividend warrants on the indorsement of one of several payees, but otherwise it seems to contemplate them as falling within the Act, where their form satisfies its requirements.

Exchequer
bonds.

Exchequer bonds, unless registered, are negotiable instruments payable to bearer, with bearer coupons attached. They are regulated by 29 & 30 Vict. c. 25; 52 Vict. c. 6; and 5 & 6 Geo. 5, c. 55. For history of these instruments see Dictionary of Political Economy.

Exchequer
bills.

Exchequer bills are negotiable instruments. They were invented about the year 1695 by Charles Montagu, the Chancellor of the Exchequer under William III., in order to supply the wants of the nation at the time of the great re-coinage. They were first regulated by the statute 48 Geo. 3, c. 1. That Act is now superseded by the Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), as amended by the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2). Exchequer bills are, at the option of the holder, current for a period of five years, but they may be sent in for payment, if the holder wishes it, once in the year at a fixed date, and during the six months preceding that fixed date they may be used for the payment of taxes. The interest on Exchequer bills is fixed half-yearly, and varies with the market rate of interest. Their negotia-

(o) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, at p. 354.

(p) Cf. *Paget* on Banking, ed. 2, p. 280; cf. *Thairwall v. Great Northern Railway*, (1910) 2 K. B. 589 (dividend warrant lost in post and cashed by thief).

bility was first affirmed in 1820 in a case where an Exchequer bill to “— or order” was improperly pledged by an agent of the owners (*q*). In 1846 the question arose whether the general lien of bankers applied to these instruments. It was held that it did, though the circumstances under which the particular bills had been deposited were such as to exclude the lien. “Exchequer bills,” said Lord Campbell in that case, “are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be the owner, and third parties acting *bonâ fide* may treat with him as owner. . . . The right acquired by a general lien is an implied pledge, and where it would arise (supposing the securities to be the property of the apparent owner) I think it equally exists if the party claiming it has acted in good faith, although the subject of that lien should turn out to be the property of a stranger” (*r*).

Pay and pension warrants issued by the Paymaster General are not negotiable instruments (*s*).

Pay and
pension
warrants.

Post office orders it seems are not negotiable instruments. Thus, in *The Fine Art Society v. Union Bank*, in 1886, the plaintiffs’ manager and the plaintiffs both banked with the defendants. The manager paid in to his own account post office orders belonging to the plaintiffs, and the defendants cashed them. The Post Office regulations provide that where a post office order is presented by a banker it is sufficient if it bears the stamp of the banker, although it is not signed by the payee. It was held that unsigned post office orders were not negotiable by delivery, and that the bank were liable for the conversion of the orders. The effect of the regulation was only to make “the signature of the banker a substitute for the

Post office
orders and
postal orders.

(*q*) *Wookey v. Pole* (1820), 4 B. & Ald. 1; see at pp. 10 and 13; but as to the effect of a blank in other cases, see *France v. Clark* (1884), 26 Ch. D. 257, at p. 262, C. A.

(*r*) *Brandao v. Barnett* (1846), 12 Cl. & F. 787, at p. 805, H. L.

(*s*) *Jones & Co. v. Coventry*, (1909) 2 K. B. 1029, at pp. 1040, 1041.

signature to the receipt of the original payee" (*t*). As to post office orders, see further sect. 23 of the Post Office Act, 1908 (8 Edw. 7, c. 48). As to postal orders, see sects. 24 and 25 of that Act, and the regulations made thereunder. For a few months after the outbreak of war postal orders were made legal tender under the powers conferred by sect. 1 (6) of the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14).

Scrip.

In *Goodwin v. Roberts*, in 1875, scrip to bearer for Russian government bonds was held to be negotiable, and where the broker in possession of the scrip improperly pledged it with his own bankers, it was held that they got a good title. The Courts of Exchequer and Exchequer Chamber based their decisions on the ground of mercantile usage. The House of Lords accepted this ground, but further affirmed the Courts below on the ground that the form of the instrument created an estoppel (*u*). In 1877, on similar facts, scrip certificates to bearer for shares in an English Joint Stock Company (the Anglo-Egyptian Banking Company, Limited), were held to be negotiable (*v*).

The non-liability of the English agents who signed the foreign scrip was clearly pointed out (*x*).

Share certificates and transfers.

Share certificates and transfers are not negotiable instruments. In *Swan v. North British Australasian Co.*, in 1863 (where the distinction between share transfers and negotiable instruments is clearly pointed out by Byles, J.), the plaintiff wishing to sell some shares in a company, executed a transfer form in blank. His broker fraudulently filled up the transfer with the description of

(*t*) *Fine Art Society v. Union Bank* (1886), 17 Q. B. D. 705, C. A., see at p. 713; and cf. *McEntire v. Potter & Co.* (1889), 22 Q. B. D. at p. 442; and *Paget* on Banking, ed. 2, p. 66.

(*u*) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 76, and in Ex. Ch. 337; affirmed by H. L. 1 App. Cas. 476. See the last ground criticised, *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, at p. 282.

(*v*) *Rumball v. Metropolitan Bank* (1877), 1 Q. B. D. 194.

(*x*) *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, at p. 344. See, too, cases cited, *ante*, p. 364, as to foreign bonds.

shares in another company and sold them to a *bonâ fide* purchaser. Held, that the sale was ineffectual, and that the plaintiff was entitled to have his name restored to the list of shareholders (*y*).

Share certificates and transfers.

In *France v. Clark*, in 1884, the holder of shares in a company deposited the certificates with C. as security for 150*l.*, and executed a transfer with the transferee's name in blank. C. deposited the certificates and transfer as security for 250*l.* with D. After C.'s death, D. filled in his own name as transferee. Held that D. had no title to the shares beyond a claim for the 150*l.* advanced by C., and that the same principle would have applied even if the shares had been negotiable instruments (*z*).

In *London County Bank v. River Plate Bank*, in 1887, share certificates of the Pennsylvania Railway with blank transfer forms indorsed on the back, were stolen by a bank manager and pledged with the plaintiffs for his private account. He afterwards obtained them back from the plaintiffs by fraud and restored them to his own bank. It was shown that these shares were treated as negotiable by delivery in the English market. Held that they were not negotiable instruments, and that the pledgees (plaintiffs) had no title to them (*a*).

In *Sheffield v. London Joint Stock Bank*, in 1888, *ante*, p. 366, share certificates, and other securities, some of which were clearly negotiable, were pledged with a money dealer and afterwards deposited by him with his bankers to secure a running account. The case turned on the point that the bankers knew that the securities were

(*y*) *Swan v. North British Australasian Co.* (1863), 32 L. J. Ex. 273, at p. 278, Ex. Ch.; cf. *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20. As to the liability of the company certifying the transfer to the transferee, see *Bishop v. Balkis Co.* (1890), 25 Q. B. D. 512, C. A.

(*z*) *France v. Clark* (1884), 26 Ch. D. 257, C. A.

(*a*) *London and County Bank v. London and River Plate Bank* (1887), 20 Q. B. D. 232. The case was appealed on another point as to negotiable bonds, and affirmed, 21 Q. B. D. 535, C. A.; cf. *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. at p. 297, per Hamilton, J.

Share certificates and transfers.

not the money dealer's own and is therefore not in point here.

In *Williams v. Colonial Bank*, in 1888, the executors of a shareholder in a New York railway executed blank transfers which were indorsed on the back of the share certificates, and handed them to a broker for sale. The broker fraudulently pledged them with the bank for advances to himself. Held, that the executors were entitled to have the certificates back from the bank. "It is admitted," said Bowen, L.J., "that the certificates are not negotiable instruments according to English law. . . . The broad principle is that, except in the case of a sale in market overt, a person does not acquire a title to a personal chattel from anybody except the true owner"; and, dealing with the question of estoppel, he points out that it must consist in some express or implied representation, and that in this case there was nothing on the face of the documents to suggest that the "bearer" would become entitled to the shares (*b*). The decision was affirmed in 1890 by the House of Lords under the name of *Colonial Bank v. Cady*, when it was held that as the dealings with the certificates took place in England, the rights in respect of such dealings must be determined by English law, and that the conduct of the executors in delivering the certificates to their broker, with the transferee's name in blank, did not preclude them from setting up their title against the bank. After distinguishing the case of negotiable instruments, Lord Herschell says: "The question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by reference to the law of the State of New York. But the rights arising out of a transaction

(*b*) *Williams v. Colonial Bank* (1888), 38 Ch. D. 388, at p. 408, C. A.

entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here" (c). In *Fry v. Smellie* (d), in 1912, the holder of shares in a company handed to an agent the share certificates and a transfer signed in blank, instructing him to borrow thereon a specified sum of money. The agent, contrary to his instructions, borrowed a less sum of money. Held that the lender could retain the documents until repayment of the sum he had lent.

Share certificates and transfers.

In *Fuller v. Glyn Mills & Co.*, in 1914 (e), the plaintiff bought shares which he left with his stockbrokers, and which with his knowledge were put into the names of two nominees of his brokers. The brokers pledged these shares with their bankers. Held that the bankers had a good title as pledgees, there being nothing to put them on inquiry as to the brokers' right to deal with them.

Treasury bills owe their origin to the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2), and they are regulated by that Act as amended by sect. 5 of the National Debt Act, 1889 (52 & 53 Vict. c. 6), and by regulations made by the Treasury. The regulations now in force are those of the 31st of May, 1889 (see Stat. Rules and Orders, revised, vol. 10). Treasury bills constitute part of the unfunded or floating debt of the country, and are dealt with as ordinary commercial bills. The Treasury advertise for tenders, and the bills are issued as three or six months bills at the best price that can be obtained for them. See also *Exchequer Bills*, ante, p. 374.

Treasury bills.

The issue of Treasury currency notes for 1*l.* and 10*s.* is authorised and regulated by the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14), as amended by the Currency and Bank Notes (Amendment) Act, 1914 (4 &

Treasury currency notes.

(c) *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, at p. 283.

(d) *Fry v. Smellie*, (1912) 3 K. B. 282, C. A.

(e) *Fuller v. Glyn Mills & Co.*, (1914) 2 K. B. 168.

5 Geo. 5, c. 72). They are bearer notes issued by the Treasury, and are legal tender throughout the United Kingdom.

Warranty
of title and
genuineness.

In the case of a bill or note payable to bearer the obligations of the transferor as regards its genuineness and his right to transfer are defined by sect. 58 (3) of the Act, *ante*. In the case of other negotiable securities, the precise extent of the transferor's liabilities is not very clear. It seems that, as in the case of a sale of goods, the seller warrants his right to sell (*f*), but it is doubtful whether the buyer is only entitled to a return of his money if the seller have no title, or whether he can sue for damages beyond.

Where the buyer had bought forged scrip which the seller had sold in good faith, it was held that he was only entitled to a return of the money he had paid (*g*). Where shares are sold and the buyer refuses to accept and pay for them the measure of damages is the best obtainable market price at the date of breach (*h*).

(*f*) *Raphael v. Burt* (1884), 1 C. & E. 325 (United States "called bonds"); cf. *Meyer v. Richards* (1895), 163 United States Rep. 385, at p. 405.

(*g*) *Westropp v. Solomon* (1849), 8 C. B. 345, see at p. 373; cf. *Young v. Cole* (1837), 3 Bing. N. O. 724 (Guatemala bonds); *Lamert v. Heath* (1846), 15 M. & W. 486 (railway scrip); *Gompertz v. Bartlett* (1853), 2 E. & B. 849 (foreign bill); *Gurney v. Womersley* (1854), 4 E. & B. 133, at p. 141 (bill with forged acceptance). †

(*h*) *Jamal v. Moolla Darwood*, (1916) A. C. 175, P. C.

APPENDIX I.

FORMS.

No. 1.—INLAND BILL OF EXCHANGE.

£100

London, 1st January, 1887.

Three months after date pay to our order the sum of one hundred pounds for value received.

ANDREWS & Co.

To Messrs. Brown & Sons, Liverpool.

No. 2.—FOREIGN BILL OF EXCHANGE.

No. 025. Exchange for £100.

Calcutta, 1st January, 1882.

Six months after sight of this first of Exchange (second and third unpaid), pay to the order of Mr. John Charles one hundred pounds, for value received, and charge the same to account of Messrs. Smith & Co. against your letter of credit, No. 21.

JAMES ANDREWS.

To Mr. J. Brown, London.

No. 3.—FOREIGN BILL OF EXCHANGE.

No. 015.

London, 1st February, 1882. For Rs. 550—8—0.

At sixty days after sight of this first of Exchange (second and third unpaid), pay to the order of Messrs. Charles & Co. five hundred and fifty rupees, eight annas, which place to account shipment of copper per "Swallow."

Value received.

ANDREWS & Co.

To Messrs. Brown & Sons, Calcutta.

No. 4.—PROMISSORY NOTE.

£100

London, 1st January, 1882.

On demand I promise to pay to Mr. John Charles or order one hundred pounds, with interest at five per cent. per annum until payment, for value received.

JOHN BROWN.

No. 5.—FRENCH BILL (a).

Paris, le 1^{er} Mai, 1887.

B. P. 1,000 fr.

A deux mois de vue il vous plaira payer par cette seule de change à l'ordre de M. Charles la somme de mille francs, valeur en marchandises (*ou en compte, ou en argent, &c.*), sans autre avis de

Votre serviteur.

A Messieurs V. Bonner & Cie.

DUFOUR.

Au Havre.

No. 6.—TREASURY BILL.

(Per Acts 40 Vict. c. 2, and 52 Vict. c. 6.)

Due

A. 0000.1.

A. 0000.1.

£

London

This Treasury bill entitles (b) or order to payment of pounds at the Bank of England out of the Consolidated Fund of the United Kingdom on the

Secretary to His Majesty's Treasury.

No. 7 (c).—NOTICE OF DISHONOUR [OR PROTEST] TO DRAWER.

[Date and address.]

Take notice that a bill, for £ drawn by you under date the on and payable at , has been

(a) See *Bravard-Demangeat*, 7th ed. p. 276.

(b) If this blank be not filled in the bill will be paid to bearer.

(c) This and the two following forms are those given in the schedule to the Bills of Exchange Bill, 1881. They were omitted in the Act.

dishonoured by non-payment* [*or non-acceptance*], and that you are held responsible therefor.

(Signed) J. S.

* N.B.—In the case of a foreign bill add "*and protested*," if it has been noted or protested.

No. 8.—NOTICE OF DISHONOUR [OR PROTEST] TO INDORSER.

[*Date and address.*]

Take notice that a bill, for £ drawn by
under date the on and payable at , and
which bears your indorsement, has been dishonoured by
non-acceptance [*or non-payment*],* and that you are held
responsible therefor.

(Signed) J. S.

* N.B.—In the case of a foreign bill add "*and protested*," if it has been noted or protested.

No. 9.—NOTICE TO DRAWER OF PARTIAL ACCEPTANCE.

[*Date and address.*]

Take notice that a bill, for £ drawn by you
under date the on , has been accepted by him
for £ only, and that you are held responsible for the
balance and expenses.

(Signed) J. S.

No. 10.—ENGLISH PROTEST FOR NON-ACCEPTANCE.

On the day of one thousand eight hundred and
eighty , I [James Brown], public notary, by lawful
authority and sworn, dwelling in in the county of
 in the United Kingdom of Great Britain and Ireland,
at the request of C. D. of [*or of the holder*] did exhibit
the original bill of exchange, whereof a true copy is on the
other side written, unto E. F. at his counting-house [*or unto*
a clerk in the counting-house of E. F.], the person upon
whom the same is drawn, and demanded acceptance thereof,
and he answered [that it would not be accepted at present,
or as the case may be].

APPENDIX I.

Wherefore I, the said notary, at the request aforesaid, did and do by these presents protest against the drawer of the said bill and all other parties thereto, and all others concerned, for all costs of exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of acceptance of the said bill. Thus protested in the presence of W. S. and T. R., witnesses.



Which I attest,

JAMES BROWN,

Notary public of — (d).

No. 11.—ACT OF HONOUR.

On the day of , one thousand eight hundred and eighty , I [James Brown], notary public, duly admitted and sworn, dwelling in [Liverpool] in the county of , in the United Kingdom of Great Britain and Ireland, do hereby certify that the original bill of exchange for pounds, of which a copy is on the other side written (and protested for non-payment) was this day exhibited unto C. D. of [Liverpool], one of the firm of [Smith & Co.], who declared before me that the said firm would pay the amount of the said bill for the honour of [James & Co.], the indorsers, holding the drawers and all prior indorsers, and all other proper persons, responsible to them the said [Smith & Co.] for the said sum, and for all interest, damages, and expenses. I have therefore granted this notarial act of honour accordingly.



Which I attest,

JAMES BROWN,

Notary public of Liverpool.

No. 12.—FRENCH PROTEST FOR NON-ACCEPTANCE.

L'an le à la requête du sieur négociant
patenté, demeurant à disant domicile en ma demeure.
J'ai soussigné, sommé et interpellé le sieur N. au

(d) See *Brooks' Notary*, ed. 5, pp. 214, 222; and *Chitty's Commercial Law*, vol. 4, p. 344.

domicile indiqué au titre ci-dessus transcrit à rue
 où étant j'ai parlé à de présentement accepter,
 pour payer à l'échéance, la lettre de change ci-dessus trans-
 crite, de la somme de lui déclarant qu'à défaut je pro-
 testais toutes pertes, dépens, dommages et intérêts du renvoi
 de la-dite lettre de change, à qui de droit, change, rechange et
 autres frais, aux risques, périls et fortune de qui il appar-
 tiendra. Lequel a répondu que (réponse) et a signé (signa-
 ture) [ou sommé de signer sa réponse, a refusé]. Laquelle
 réponse j'ai pris pour refus d'acceptation et j'ai réitéré les
 protestations ci-dessus faites sous toutes réserves.

Le tout fait en présence et assisté de J. B., demeurant à
 L— et de T. S., demeurant à M— témoins français, majeurs,
 lesquels ont avec moi signé le présent (*e*), dont acte, duquel
 j'ai, au dit domicile, et parlant comme dessus, laissé au
 susnommé copie, ainsi que de la dite lettre de change. Le
 coût est de . . .

[*Signatures.*]

(*e*) *Bravard-Demangeat*, 7th ed. p. 248. The witnesses, though
 usual, are not necessary.

APPENDIX II.

STATUTES.

THE JUDGMENTS ACT, 1838.

(1 & 2 VICT. c. 110.)

How bills,
notes, and
cheques are
to be taken
in execution.

Sec. 12.—That by virtue of any writ of fieri facias to be sued out of any superior or inferior Court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived: and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security;

and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied: and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: Provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

1 & 2 Vict.
c. 110.

Note.—See note to sect. 38 of the Bills of Exchange Act, *ante*.

STAMP ACT, 1853.

(16 & 17 VICT. c. 59.)

Sec. 19.—Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof.

Payment by
banker of
draft or order
held under
forged in-
dorsement.

Note.—The remaining sections of this Act, which related to stamps, have long been repealed. The provisions of this section, in so far as they relate to bills payable on demand, are reproduced by sect. 60 of the Bills of Exchange Act, *ante*, p. 239; but it was not included in the schedule of repeals, because it was thought it might apply to drafts or orders other than bills; and it has recently been held that it applies to drafts drawn by one branch

16 & 17 Vict. bank on another (*a*). For the decisions on it, see notes to
 c. 59. sect. 60, *ante*, p. 240. It has no apparent connection with
 — — sect. 18, the section which preceded it, and which related to
 spoiled stamps. The section, says Lord Lindley, "was inserted
 at the instance of Lord Overstone, when cheques to order on
 demand bearing penny stamps were first introduced. He saw
 that these would become common, and would expose bankers to
 serious risks from forged indorsements, and the section was
 inserted for their protection. The Act except sect. 19 has been
 repealed, and in 1872 it was made applicable to documents issued
 by the Paymaster-General in pursuance of the Chancery Funds
 Act (35 & 36 Vict. c. 44, s. 11)." It is perhaps doubtful how
 far the section applies to foreign drafts, *e.g.*, a draft drawn by a
 branch office abroad on the head office in England (*b*).

THE COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125.)

Lost nego-
 tiable instru-
 ments.

Sec. 87.—In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court, or a judge, or a master, against the claims of any other person upon such negotiable instrument.

Note.—In so far as this section relates to bills and notes, it is reproduced and extended by sect. 70 of the Bills of Exchange Act, *ante*, p. 267. It was not repealed because it applies to all negotiable instruments, and not merely to bills and notes.

THE BANK HOLIDAYS ACT, 1871.

(34 & 35 VICT. c. 17.)

An Act to make provision for Bank Holidays, and respecting obligations to make payments and do other acts on such Bank Holidays.

WHEREAS it is expedient to make provision for rendering the day after Christmas Day, and also certain other days, bank

(*a*) *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, 251, per Lord Lindley, H. L.

(*b*) *Ibid.*

holidays, and for enabling bank holidays to be appointed by royal proclamation: 34 & 35 Vict. c. 17.

Be it enacted, &c.:

Sec. 1.—The several days in the schedule to this Act mentioned (and which days are in this Act hereinafter referred to as bank holidays) shall be kept as close holidays in all banks in England and Ireland and Scotland respectively, and all bills of exchange and promissory notes which are due and payable on any such bank holiday shall be payable, and in case of non-payment may be noted and protested, on the next following day, and not on such bank holiday; and any such noting or protest shall be as valid as if made on the day on which the bill or note was made due and payable; and for all the purposes of this Act the day next following a bank holiday shall mean the next following day on which a bill of exchange may be lawfully noted or protested.

Bills due on bank holidays to be payable on the following day.

Sec. 2.—When the day on which any notice of dishonour of an unpaid bill of exchange or promissory note should be given, or when the day on which a bill of exchange or promissory note should be presented or received for acceptance, or accepted or forwarded to any referee or referees, is a bank holiday, such notice of dishonour shall be given and such bill of exchange or promissory note shall be presented or forwarded on the day next following such bank holiday.

Provision as to notice of dishonour and presentation for honour.

Sec. 3.—No person shall be compellable to make any payment or to do any act upon such bank holidays which he would not be compellable to do or make on Christmas Day or Good Friday; and the obligation to make such payment and do such act shall apply to the day following such bank holiday; and the making of such payment and doing such act on such following day shall be equivalent to payment of the money or performance of the act on the holiday.

As to any payments on bank holidays.

Sec. 4.—It shall be lawful for her Majesty, from time to time, as to her Majesty may seem fit, by proclamation, in the manner in which solemn fasts or days of public thanksgiving may be appointed, to appoint a special day to be observed as a bank holiday, either throughout the United Kingdom or in any part thereof, or in any county, city, borough, or district therein, and any day so appointed shall be kept as a close holiday in all banks within the locality mentioned in such

Appointment of special bank holidays by royal proclamation.

34 & 35 Vict.
c. 17.

proclamation, and shall, as regards bills of exchange and promissory notes payable in such locality, be deemed to be a bank holiday for all the purposes of this Act.

Note.—See the proclamation of 24th March, 1902, appointing the 26th and 27th of June as general bank holidays for the purpose of the Royal Coronation, and for a proclamation appointing a localized bank holiday, see the proclamation of 20th October, 1902, appointing the 25th October as a bank holiday throughout the county of London for the purpose of the Royal progress to the City. And see the proclamation of 22nd March, 1911, “appointing Thursday, June 22nd, and Friday, June 23rd, bank holidays and public holidays throughout the United Kingdom and in the County of London respectively,” to celebrate the King’s coronation and progress through London.

Day ap-
pointed for
bank holiday
may be
altered by
Order in
Council.

Sec. 5.—It shall be lawful for her Majesty in like manner, from time to time, when it is made to appear to her Majesty in Council in any special case that in any year it is inexpedient that a day by this Act appointed for a bank holiday should be a bank holiday, to declare that such day shall not in such year be a bank holiday, and to appoint such other day as to her Majesty in Council may seem fit to be a bank holiday instead of such day, and thereupon the day so appointed shall in such year be substituted for the day so appointed by this Act.

Exercise of
powers con-
ferred by
sects. 4 & 5
in Ireland
by Lord
Lieutenant.
Short title.

Sec. 6.—[*Superseded and repealed by sect. 3 of the Holidays Extension Act, 1875 (38 & 39 Vict. c. 13).*]

Sec. 7.—This Act may be cited for all purposes as “The Bank Holidays Act, 1871.”

SCHEDULE.

Bank Holidays in England and Ireland.

Easter Monday.

The Monday in Whitsun week.

The first Monday in August.

The twenty-sixth day of December, if a week day.

Bank Holidays in Scotland.

New Year’s Day.

Christmas Day.

If either of the above days falls on a Sunday the next following Monday shall be a bank holiday.

Good Friday.

The first Monday of May.

The first Monday of August.

34 & 35 Vict.
c. 17.

Note.—For the history of this legislation, see an article in the Journal of the Institute of Bankers, vol. 22, p. 205 (May, 1901). This Act is amended and extended by the Holidays Extension Act, 1875 (38 & 39 Vict. c. 13, set out below), and by the Bank Holidays (Ireland) Act, 1903 (3 Edw. 7, c. 1), which provides for making St. Patrick's Day a bank holiday in Ireland (see *post*, p. 393). As regards bills and notes it must be read with and subject to sect. 14 of the Bills of Exchange Act, *ante*, p. 39.

HOLIDAYS EXTENSION ACT, 1875.

(38 & 39 VICT. c. 13.)

WHEREAS it is expedient to amend "The Bank Holidays Act, 1871" (in this Act referred to as the Holidays Act of 1871), and to extend certain of the holidays named therein to the customs, bonding warehouses, and docks, and to amend the Acts relating to holidays in the inland revenue offices in England and Ireland:

34 & 35 Vict.
c. 17.

Be it therefore enacted, &c.

Sec. 1.—From and after the passing of this Act, the several days and each and every of them in the schedule to this Act mentioned, being holidays under the Holidays Act of 1871, shall be kept as public holidays in the customs, inland revenue offices, and bonding warehouses in England and Ireland respectively; and it shall be lawful for the directors or governing body (by whatever name known) of any dock or docks in England and Ireland respectively to cause the said days or any of them to be kept as holidays in such dock or docks, any restraining clause in any Act of Parliament notwithstanding: Provided that such directors or governing body shall give notice thereof by inserting an advertisement to that effect in some newspaper circulating in the locality of such dock or docks, and by affixing to the principal gates of the said dock or docks, or to some conspicuous place in the immediate neighbourhood, a notice to the same effect for at least a week immediately preceding any day which it is intended to observe as a holiday under this Act; and

Days mentioned in schedule to be holidays.

38 & 39 Vict.
c. 13. the anniversary of the coronation of her Majesty and her successors, and the birthday of the Prince of Wales, shall no longer be kept as holidays in any inland revenue office in England or Ireland.

26th Decem-
ber falling
on Sunday. *Sec. 2.*—Whenever the 26th day of December shall fall on a Sunday, the Monday immediately next following, that is to say, the 27th day of December, shall be a holiday under this Act, and also under the Holidays Act of 1871.

34 & 35 Vict.
c. 17. *Sec. 3.*—The powers conferred on her Majesty by sections 4 and 5 of the Holidays Act of 1871, may be exercised in Ireland as far as relates to that part of the United Kingdom, by the Lord Lieutenant in Council, and section 6 of that Act is hereby repealed; and those powers of her Majesty and of the Lord Lieutenant in Council shall extend to holidays under this Act.

Short title. *Sec. 4.*—This Act may be cited for all purposes as “The Holidays Extension Act, 1875.”

SCHEDULE.

Easter Monday.

Monday in Whitsun week.

The first Monday in August.

The 26th of December (if a week day).

St. Patrick's
Day in
Ireland. *Note.*—The provisions of this Act and of the Act of 1871 are further extended by the Bank Holiday (Ireland) Act, 1903 (3 Edw. 7, c. 1), which makes St. Patrick's Day a bank holiday in Ireland, and provides as follows:—

Sec. 1.—The provisions of the Bank Holidays Act, 1871, and the Holidays Extension Act, 1875, so far as they relate to Ireland, are extended to the seventeenth day of every March when a week day, and, if a Sunday, to the next day following, and this day shall be a bank holiday in Ireland within the meaning of these Acts.

THE REVENUE ACT, 1883.

(46 & 47 VICT. c. 55.)

Extension of
45 & 46 Vict.
c. 61, ss. 76
to 82, and
24 & 25 Vict.
c. 98, s. 25, to *Sec. 17.*—Sections seventy-six to eighty-two, both inclusive, of the Bills of Exchange Act, 1882, [and section twenty-five of the Forgery Act, 1861,] shall extend to any document issued by a customer of any banker, and intended to enable

any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. certain drafts on bankers.

Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

For the purpose of this section, her Majesty's Paymaster-General, and the Queen's and Lord Treasurer's Remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

Note.—See *ante*, p. 296, as to crossed cheques, and *Capital and Counties Bank v. Gordon*, (1903) A. C. 240, at pp. 250, 251, H. L.

Sect. 25 of the Forgery Act, 1861, is now reproduced in sect. 1 (3) of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27).

SUPREME COURT OF JUDICATURE ACT, 1884.

(47 & 48 VICT. c. 61.)

Sec. 14.—Where any person neglects or refuses to comply with a judgment or order, directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate, and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it. Execution or indorsement of instrument by order of Court.

Note.—See *Annual Practice*.

THE COUNTY COURTS ACT, 1888.

(51 & 52 VICT. c. 43.)

Sec. 147.—Every bailiff or officer executing any process of execution issuing out of the Court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the What goods may be taken in execution.

51 & 52 Vict.
c. 43.

wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of £5, which shall to that extent be protected from such seizure), and may also seize and take any money or bank notes (whether of the Bank of England or of any other bank) and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money, belonging to any such person against whom any such execution shall have issued as aforesaid.

Securities
seized to be
held by high
bailiff.

Sec. 148.—The high bailiff shall hold any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money which shall have been seized or taken under the last preceding section, as a security for the amount directed to be levied by such execution, or so much thereof as shall not have been otherwise levied or raised, for the benefit of the plaintiff; and the plaintiff may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby when the time of payment thereof shall have arrived.

Note.—See *County Courts Annual Practice*.

STAMP ACT, 1891.

(54 & 55 VICT, c. 39.)

All duties
to be paid
according to
regulations
of Act.

Sec. 2.—All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

Note.—A stamp objection may be pleaded, see *e.g.*, *Oetlinger v. Cohen*, (1918) 1 K. B. 582. But it is not usual to do so, because when the instrument is tendered in evidence the officer of the Court raises the objection.

Facts and
circumstances
affecting duty

Sec. 5.—All the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully

and truly set forth in the instrument; and every person who with intent to defraud her Majesty—

54 & 55 Vict.
c. 39.

- (a) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or
- (b) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances,

to be set forth in instruments.

[Act of 1870, s. 10.]

shall incur a fine of £10.

Note.—A post-dated cheque is valid (c), but it is conceived that the person who issues it may possibly incur a penalty under this section.

Sec. 6.—(1.) When an instrument is chargeable with *ad valorem* duty in respect of (a) any money in any foreign or colonial currency, or (b) any stock or marketable security, duty shall be calculated on the value on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

Mode of calculating *ad valorem* duty in certain cases. [Cf. Act of 1870, s. 11.]

Note.—This section is amended by sect. 12 of the Finance Act, 1899 (62 & 63 Vict. c. 9), as regards instruments “other than a bill of exchange or promissory note.” It therefore stands as regards bills and notes.

(2.) Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with that statement, it is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Note.—The sum receivable by the holder at maturity is calculated according to a different rule. See sect. 72 (4), *ante*, p. 281.

Sec. 8.—(1.) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive

General directions as to the

(c) *Gatty v. Fry* (1877), 2 Ex. D. 265; *Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.

54 & 55 Vict.
c. 39.

cancellation
of adhesive
stamp.

[Act of 1870,
s. 24.]

stamp, is not to be deemed duly stamped (*d*) with an adhesive stamp unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectually cancels the stamp, and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2.) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(3.) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid shall incur a fine of £10.

Note.—The provisoes to sect. 35 must be read in with this section. It has been ruled that cancellation made with a stamp or die is sufficient, and it seems that the cancellation may be made at any time before verdict, provided it can be made by the proper person (*e*).

Bank Notes, Bills of Exchange, and Promissory Notes.

Sec. 29.—For the purposes of this Act, the expression “banker” means any person carrying on the business of banking in the United Kingdom, and the expression “bank note” includes—

- (a) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand; and
- (b) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand,

Meaning of
“banker”
and “bank
note.”

[Cf. Act. of
1870, s. 45.]

(*d*) Cf. *Marc v. Rouy* (1874), 31 L. T. N. S. 372.

(*e*) *Viale v. Michael* (1874), 30 L. T. N. S. 453.

whether the same be so expressed or not and in what- 54 & 55 Vict.
ever form, and by whomsoever the bill or note is c. 39.
drawn or made.

Sec. 30.—A bank note issued duly stamped, or issued un- Bank notes
stamped by a banker duly licensed or otherwise authorized to may be
issue unstamped bank notes, may be from time to time re-issued.
re-issued without being liable to any stamp duty by reason [Act of 1870,
s. 46.]
of the re-issuing.

Sec. 31.—(1.) If any banker, not being duly licensed or Penalties for
otherwise authorized to issue unstamped bank notes, issues, or issuing or
permits to be issued, any bank note not being duly stamped, receiving an
he shall incur a fine of £50. unstamped
bank note.
[Act of 1870,
s. 47.]

(2.) If any person receives or takes in payment or as a security any bank note issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of £20.

Sec. 32.—For the purposes of this Act the expression Meaning of
“bill of exchange” includes draft, order, cheque, and letter “bill of
of credit, and any document or writing (except a bank note) exchange.”
entitling or purporting to entitle any person, whether named [Cf. Act of
1870, s. 48.]
therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression “bill of exchange payable on demand” includes— Bill on
demand.

(a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

(b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

54 & 55 Vict.
c. 39.

Note.—A reference to sect. 3 of the Bills of Exchange Act, *ante*, p. 9, shows that many documents require to be stamped as bills of exchange which have none of the other incidents of bills, and which are clearly not negotiable instruments (*f*). A transfer order by a bank on the Bank of England in favour of the Customs is a bill payable on demand (*g*). Compare the definition of "bill payable on demand" given by sect. 10 of the Bills of Exchange Act, *ante*, p. 33, and note that for stamp purposes bills of exchange payable not more than three days after sight or date are put on the footing of demand bills, see sect. 10 of the Finance Act, 1899, *post*, p. 408.

Stamp duties were first imposed on bills and notes by an Act of 1781, the 22 Geo. 3, c. 33. It applied only to inland instruments. Bills and notes drawn abroad were not subjected to stamp duty till 1854. The Stamp Act of that year, the 17 & 18 Vict. c. 83, which introduced adhesive stamps, first imposed the duty on the latter class of instruments.

Meaning of
"promissory
note."

[Act of 1870,
s. 49.]

Sec. 33.—(1.) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

Note.—As to "bank note," see sect. 29. A reference to sect. 83 of the Bills of Exchange Act, *ante*, p. 306, shows that many instruments require to be stamped as promissory notes which have none of the other incidents of promissory notes.

See this section examined in *British India Steam Navigation Co. v. Inland Revenue* (1881), 7 Q. B. D. 165, where an instrument purporting to be a debenture, though coming within the terms of this section, was held to be properly stamped as a debenture, and not to require a note stamp. As to instruments intended to operate as agreements and not as notes, see *Mortgage Insurance Corporation v. Inland Revenue* (1888), 21 Q. B. D. 352, C. A., where it was held that a document promising to pay money, but containing other stipulations, did not require a promissory note stamp. In *Brown, Shipley & Co. v. Inland Revenue*, (1895) 2 Q. B. 598, C. A., it was held that promissory notes issued by an American railway, which contained a pledge of collateral security, required to be stamped as "marketable

(*f*) See this section discussed in *Buck v. Robson* (1878), 3 Q. B. D. 486, where *Ex parte Shellard* (1873), L. R. 17 Eq. 109, was disapproved; and see, too, *Fisher v. Calvert* (1879), 27 W. R. 301, M. R.

(*g*) *The Committee of London Clearing House Bankers v. Inland Revenue*, (1896) 1 Q. B. 222 and 542 in C. A.

securities" and not as promissory notes. In *Speyer Bros. v. Inland Revenue*, (1908) A. C. 92, H. L., it was held that gold coupon notes of the Mexican Government came within the definition both of promissory note and marketable security, and that the Crown was therefore entitled to demand the higher duty, viz., the duty on marketable securities. But by sect. 8 of the Finance Act, 1897 (60 & 61 Vict. c. 24), County Council and municipal bills, though charged on the local rate, are to be stamped as promissory notes and not as marketable securities.

54 & 55 Vict.
c. 39.

Sec. 34.—(1.) The fixed duty of [twopence] on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

Provisions
for use of
adhesive
stamps on
bills and
notes.

[Act of 1870,
s. 50.]

(2.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

[Act of 1870,
s. 51.]

Note.—By sect. 36 of the Finance Act, 1918, *post*, p. 415, "twopence" is substituted for one penny in this section. The proviso to sect. 38, enabling the person to whom a bill on demand is presented for payment to stamp it, must be read in with the present section. In *Hobbs v. Cathie* (1890), 6 Times Law Rep. 292, it was held that a cheque which was stamped by an intermediate holder, not the drawer, was improperly stamped. Under sect. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), as amended by sect. 10 of the Revenue Act, 1909 (9 Edw. 7, c. 43), *post*, p. 408, bills payable not more than three days after date or sight may be stamped with a penny stamp. This sum is now raised to twopence.

Sec. 35.—(1.) Every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped, shall, before he presents for payment, or indorses, transfers, or in any manner negotiates (*h*) or pays the bill or note, affix thereto a proper adhesive stamp, or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

Provisions as
to stamping
foreign bills
and notes.

[Act of 1870,
s. 51.]

(2.) Provided as follows—

(a) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed

(*h*) Cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

54 & 55 Vict.
c. 39.

thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person;

- (b) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed.

(3.) But neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

Other bills
and notes,
how stamped.

Note.—The effect of the Act of 1891, as amended by the Acts of 1899, 1909 and 1918, *post*, pp. 408, 415, appears to be this:—

1. Bills of exchange payable on demand, or not more than three days after date or sight, may be stamped with an adhesive or impressed twopenny stamp. Cf. *Re Boyse* (1886), 33 Ch. D. 612.
2. Other bills, if drawn in the United Kingdom, must be stamped with an impressed *ad valorem* stamp, and if drawn abroad, with adhesive *ad valorem* stamps.
3. Promissory notes, if made abroad, must be stamped with adhesive *ad valorem* stamps, and if made in the United Kingdom, with an impressed *ad valorem* stamp. Cf. *Oetlinger v. Cohen*, (1918) 1 K. B. 582.

Foreign
stamp laws.

By sect. 72 (1) of the Bills of Exchange Act, *ante*, p. 274, it is provided that where a bill or note is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue, and this seems right, as the present Stamp Act requires bills issued abroad to be stamped here, and makes no allowance for the foreign stamp.

As to bills
and notes
purporting
to be drawn
abroad.

[Cf. Act of
1870, s. 52.]

Sec. 36.—A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

Note.—Compare sect. 4 of the Bills of Exchange Act, *ante*, p. 17, as to other purposes.

Terms upon
which bills
and notes

Sec. 37.—(1.) Where a bill of exchange or promissory note has been written on material bearing an impressed

stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

54 & 55 Vict.
c. 39.

may be
stamped after
execution.]

[Act of 1870,
s. 53.]

(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

Sec. 38.—(1.) Every person who issues (*i*), indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note (*k*) either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

Penalty for
issuing, &c.
any un-
stamped bill
or note.

[Act of 1870,
s. 54.]

(2.) Provided that if any bill of exchange payable on demand, or at sight, or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of [twopence], and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, as far as respects the duty, to be deemed valid and available.

(3.) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

Note.—By sect. 36 of the Finance Act, 1918, *post*, p. 415, “two pence” is now substituted for “one” in this section. As to the proviso, see note to sect. 34, *ante*, p. 399.

Effect where
bill or note
not properly
stamped.

In a Scotch case, a note made abroad was presented for payment unstamped, but was stamped before action brought. It was held that the action was maintainable (*l*).

An unstamped bill or note is admissible in criminal proceedings (see sect. 14 of the Stamp Act), and as heretofore it would be

(*i*) See sect. 2 of the Bills of Exchange Act, *ante*, p. 7, and notes, and cf. *Bank of Montreal v. Exhibit and Trading Co.* (1906), 17 Com. Cas. 250 (note signed in Liverpool and posted to payee in Canada).

(*k*) Cf. *Marc v. Rouy* (1874), 31 L. T. N. S. 372.

(*l*) *Broddeius v. Grischotti* (1887), 24 Sc. L. R. 386.

54 & 55 Vict.
c. 39.

admissible in evidence for the purpose of proving some purely collateral fact, such as fraud (*m*).

The holder of a bill or note which is void for want of a stamp may, nevertheless, bring an action on the consideration against the party to whom he gave the consideration (*n*), though he cannot use the instrument as evidence (*o*). As the bill is void the omission to present or give notice of dishonour is immaterial (*p*).

Possibly a person who indorses a bill, or transfers it by delivery, undertakes that it is not void under the stamp laws when transferred (*q*).

An unstamped bill or note is admissible for the purpose of showing that it is not properly stamped, *e.g.*, to negative defence of payment by a bill (*r*), but is not admissible to prove the receipt of money (*s*). A witness may also refresh his memory by referring to an unstamped note (*t*).

No appeal lies from the decision of a judge wrongly admitting an unstamped document (*u*).

One bill only
of a set need
be stamped.
[Act of 1870,
s. 55.]

Sec. 39.—When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated (*x*) apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

(*m*) *Gregory v. Fraser* (1813), 3 Camp. 453 (maker drunk); cf. *Sutton v. Toomer* (1827), 7 B. & C. 416; *Alpe's Stamp Laws*, ed. 12, pp. 33—38, but see *Fengl v. Fengl*, (1914) P. 274.

(*n*) *Brown v. Watts* (1808), 1 Taunt. 353; cf. *Sutton v. Toomer*, *supra*; *Plimley v. Westley* (1835), 2 Bing. N. C. 249; and *Gompertz v. Bartlett* (1853), 2 E. & B. 849.

(*o*) *Sweeting v. Halse* (1829), 9 B. & C. 365; *Jardine v. Payne* (1831), 1 B. & Ad. 663, at p. 670.

(*p*) *Cundy v. Marriott* (1831), 1 B. & Ad. 696.

(*q*) See sect. 55, *ante*, p. 213; sect. 58 (3), *ante*, p. 223; and *Gompertz v. Bartlett* (1853), 23 L. J. Q. B. 65.

(*r*) *Smart v. Nokes* (1844), 6 M. & Gr. 911.

(*s*) *Ashling v. Boon*, (1891) 1 Ch. 568. Cf. *Durie v. Fielding* (1893), 20 Ct. of Sess. Cas. 295.

(*t*) *Birchall v. Bullough*, (1896) 1 Q. B. 325.

(*u*) *Blewitt v. Tritton*, (1892) 2 Q. B. 327, C. A.

(*x*) Cf. *Griffin v. Weatherby* (1868), L. R. 3 Q. B. at p. 760.

*Amount of Duty as per Schedule.*54 & 55 Vict.
c. 39.Amount of
duty.

	£	s.	d.
Bill of exchange payable on demand, or at sight, or on presentation, [or within three days after date or sight (<i>y</i>)]	0	0	[2]

And *see* sects. 32, 34, and 38. By sect. 36 of the Finance Act, 1918, *post*, p. 415, the duty of one penny is increased to twopence.

	£	s.	d.
Bill of exchange of any other kind whatsoever (except a bank note) and promissory note of any kind whatsoever (except a bank note) drawn or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United Kingdom where the amount or value (cf. sect. 6) of the money for which the bill or note is drawn or made does not exceed £5	0	0	[2]
Exceeds £5 and does not exceed £10	0	0	2
„ 10 „ 25	0	0	3
„ 25 „ 50	0	0	6
„ 50 „ 75	0	0	9
„ 75 „ 100	0	1	0
„ 100— for every £100, and also for any fractional part of £100 of such amount or value	0	1	0

Note.—This scale is varied as regards bills of exchange above 50*l.* drawn and expressed to be payable out of the United Kingdom, by sect. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), *post*, p. 408, which provides that where the amount of the bill exceeds 50*l.*, the stamp shall be 6*d.*, and that where the amount exceeds 100*l.* the stamp shall be 6*d.* for every hundred pounds and also for any fractional part of a hundred pounds of that amount.

The fact that a bill is payable with interest does not affect the stamp (*z*), *e.g.*, a note for 50*l.* payable with interest at 5 per cent. requires only a 6*d.* stamp. Bill payable with interest.

By sect. 36 of the Finance Act, 1918, *post*, p. 415, the one penny duty is increased to twopence.

(*y*) These words are added by sect. 10 of the Finance Act, 1899 (62 & 63 Vict. c. 9), *post*, p. 408.

(*z*) *Pruessing v. Ing* (1821), 4 B. & Ald. 204; *Wills v. Nott* (1834), 4 Tyr. 726.

54 & 55 Vict.

c. 39.

Exemptions.

Exemptions.

- (1.) Bill or note issued by the Bank of England or Bank of Ireland.
- (2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.
- (3.) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom directing the payment of any sum of money, the sum not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.
- (4.) Letter of credit granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom.
- (5.) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England, or by the Accountant-General of the Supreme Court of Judicature in Ireland.
- (6.) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds.
- (7.) Bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant-General of the Navy.
- (8.) Bill drawn (according to a form prescribed by her Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces, or for any other expenditure connected therewith.
- (9.) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

- (10.) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue (*a*). 54 & 55 Vict.
c. 39.
- (11.) [Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security (*b*).]

Note.—And see sects. 32, 33, 34, 35, 36, 37, 38 and 39. There are also various special exemptions collected in *Alpe's Stamp Laws*, ed. 12, p. 189, see, *e.g.*, sect. 33 of the Friendly Societies Act, 1896, and sect. 38 of the Post Office Act, 1908 (8 Edw. 7, c. 48).

Notarial Acts.

Sec. 90.—The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary. Duty may be denoted by adhesive stamp.
[Act of 1870, s. 116.]

Note.—Where the duty on a bill or note does not exceed 1s., the duty on the protest is the same as on the bill or note. In any other case the duty is 1s., and the duty on any notarial act other than a protest is 1s. *See Sched.* Amount.

Receipts.

Sec. 101.—(1.) For the purposes of this Act the expression “receipt” includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and Provisions as to duty upon receipts.
[Act of 1870, s. 120.]

(*a*) This exemption applies only to bills drawn for the sole purpose of remitting and placing to its proper account money which is already public money: *The Committee of London Clearing Bankers v. The Commissioners of Inland Revenue*, (1896) 1 Q. B. 222, 542, C. A.

(*b*) By sect. 40 of the Finance Act, 1894 (57 & 58 Vict. c. 30), a coupon for interest on a marketable security as defined by the Stamp Act, 1891, being one of a set of coupons, whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty. See, too, *Rothschild v. Inland Revenue*, (1894) 2 Q. B. 142.

54 & 55 Vict.
c. 39.

[Act of 1870,
s. 121.]

Terms upon
which
receipts may
be stamped
after execu-
tion.

[Act of 1870,
s. 122.]

Penalty for
offences in
reference to
receipts.

[Act of 1870,
s. 123.]

whether the same is or is not signed with the name of any person.

(2.) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Sec. 102.—A receipt given without being stamped may be stamped with an impressed stamp upon the terms following, that is to say,—

(1.) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds:

(2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Sec. 103.—If any person—

(1.) Gives a receipt liable to duty and not duly stamped;
or

(2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3.) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

SCHEDULE.

RECEIPT given for, or upon the payment of, money amounting to two pounds or upwards, one penny.

Exemptions.

(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.

(2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

(3.) Receipt given for or upon the payment of any parlia-

mentary taxes or duties, or of money to or for the use of her Majesty. 54 & 55 Vict. c. 39.

- (4.) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom.
- (5.) Receipt given by any agent for money imprest to him on account of the pay of the army.
- (6.) Receipt given by any officer, seaman, marine or soldier, or his representatives, for or on account of any wages, pay or pension, due from the Admiralty or Army Pay Office.
- (7.) Receipt given for any principal money or interest due on an exchequer bill.
- (8.) *Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.* [Repealed 58 Vict. c. 16, s. 9.]
- (9.) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.
- (10.) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively.
- (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.
- (12.) Receipt given for any allowance by way of drawback or otherwise upon the exportation of any goods or merchandise from the United Kingdom.
- (13.) Receipt given for the return of any duty of customs upon a certificate of over entry.

Note.—And see sects. 101, 102, and 103.

54 & 55 Vict.
c. 39.

Indorsement
receipt.

By sect. 9 of the Finance Act, 1895 (58 & 59 Vict. c. 16), "Exemption numbered eight under the head 'Receipt' in the First Schedule to the Stamp Act, 1891, is hereby repealed; and the duty shall be charged as if the exemption had not been contained in that schedule; provided that neither the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped, nor the name of the payee written upon a draft or order, if payable to order, shall constitute a receipt chargeable with stamp duty."

THE FINANCE ACT, 1899.

(62 & 63 VICT. c. 9.)

Reduction
of duty on
certain bills
of exchange.

Sec. 10.—(1.) The duty payable under the Stamp Act, 1891, on bills of exchange drawn and expressed to be payable out of the United Kingdom, when actually paid or indorsed or in any manner negotiated in the United Kingdom, shall, where the amount of the money for which the bill is drawn exceeds fifty pounds, be reduced so as to be—

- (a) where the amount exceeds fifty pounds and does not exceed one hundred pounds, sixpence; and
- (b) where the amount exceeds one hundred pounds, sixpence for every one hundred pounds and also for any fractional part of one hundred pounds of that amount.

(2.) The stamp duty chargeable under the Stamp Act, 1891, on bills of exchange expressed to be payable at a period not exceeding three days after date or sight shall be one penny, in lieu of the duty now chargeable thereon; and accordingly the first heading, Bill of Exchange, in the Schedule to that Act, shall be read as if the words "or within three days after date or sight" were contained therein, after the word "presentation."

Note.—This section is explained or supplemented by sect. 10 of the Revenue Act, 1909 (9 Edw. 7, c. 43), which runs as follows:—

10. The provisions in sections thirty-four and thirty-eight of the Stamp Act, 1891, which relate to bills of exchange payable on demand or at sight, or on presentation, shall apply also to bills of exchange expressed to be payable at a period not exceeding three days after date or sight which are chargeable with the duty of [one penny] under sub-section (2) of section 10 of the Finance Act, 1899. See now sect. 36 of the Finance Act, 1918, *post*, p. 415.

BILLS OF EXCHANGE (CROSSED CHEQUES)
ACT, 1906.

(6 EDW. 7, c. 17.)

An Act to amend section eighty-two of the Bills of Exchange Act, 1882. [4th August, 1906.]

Sec. 1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. Amendment of 45 & 46 Vict. c. 61, s. 82.

Sec. 2. This Act may be cited as the Bills of Exchange (Crossed Cheques) Act, 1906, and this Act and the Bills of Exchange Act, 1882, may be cited together as the Bills of Exchange Acts, 1882 and 1906. Short title.

Note.—This Act was passed to get rid of the decision in *Capital and Counties Bank v. Gordon*, A. C. (1903), 240, H. L., where it was held that if a bank received a crossed cheque from a customer, and at once credited his account with the amount, the bank became holders for value of the cheque; and in receiving payment thereof, received it on their own account, and not merely as agents for collection on behalf of their customer. They therefore did not come within the protection given by sect. 82 of the Act of 1882 to collecting bankers. See *ante*, p. 304.

The Bill, which became the Act of 1906, was drafted by me under instructions from Lord Halsbury in 1903, but it was blocked in the House of Commons till 1906.

THE COMPANIES (CONSOLIDATION) ACT, 1908.

(8 EDW. 7, c. 69.)

Sec. 63.—(1.) Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position in letters easily legible: Publication of name by limited company.

(b) shall have its name engraven in legible characters on its seal:

(c) shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods

8 Edw. 7, c. 69. purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

(2.) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding five pounds for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(3.) If any director, manager, or officer of a limited company, or any person on its behalf uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Note.—This section reproduces, with verbal amendments, sects. 41 and 42 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which in its turn reproduced sect. 31 of the 19 & 20 Vict. c. 47. Under the last-mentioned enactment a bill was addressed to the S. Steam Packet Co. The proper name was the S. Steam Packet Co., *Limited*. The secretary accepted the bill, signing it "J. M., Secretary to the said Company." He was held personally liable on this acceptance: *Penrose v. Martyr* (1858), E. B. & E. 499; cf. *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377, where the words forming the company's name were transposed, and *Nassau Steam Press v. Tyler* (1894), 70 L. T. N. S. 376, where words were added in the company's name. But where, by an accident in stamping the company's name to an acceptance the word "limited" did not appear as it passed the margin of the paper, the acceptance was held to be the acceptance of the company: *The Dermatine Co. v. Ashworth* (1905), 21 Times L. R. 510. The address to the drawee and the accept-

ance must be construed together: *Stacey & Co. v. Wallace* (1912), 106 L. T. 541.

8 Edw. 7,
c. 69.

Sec. 77. A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company, by any person acting under its authority.

Bills of
exchange and
promissory
notes.

Note.—This section reproduces, with a verbal alteration, sect. 47 of the Companies Act, 1862 (25 & 26 Vict. c. 89). See some general remarks on the repealed section in *Ex p. Overend* (1869), L. R. 4 Ch. App. at pp. 472, 473; *Re Barber* (1870), L. R. 9 Eq. 732, 735. Compare to like effect the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), sect. 33.

Sect. 77 does not confer on all limited companies the capacity to issue bills and notes. It refers only to such companies as have the requisite capacity; cf. *Re Peruvian Railways Co.* (1867), L. R. 2 Ch. 617. To render a company liable on a negotiable instrument three conditions must be fulfilled: 1. The company must have the requisite capacity, see notes to sect. 22 of the Act, *ante*, p. 72. 2. The signature must be affixed by some person having authority to sign on behalf of the company, see, *e.g.*, *Premier Industrial Bank v. Carlton Manufacturing Co.*, (1909) 1 K. B. 106. 3. The signature must be in such form as to be the signature of and bind the company, see, *e.g.*, *Chapman v. Smethurst*, (1909) 1 K. B. 927, C. A.; *Stacey v. Wallace* (1912), 106 L. T. N. S. 541, and notes to sect. 22, *ante*, p. 72.

THE BANKRUPTCY ACT, 1914.

(4 & 5 GEO. 5, c. 59.)

SCHEDULE I., R. 11.

11. A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

Voting by
bill holder.

Note.—This rule, which reproduces rule 11 of the Act of 1883, substantially follows a clause in Sir J. Holker's Bill of 1880. Before the Act of 1883 a bill holder was held to be merely a guaranteed and not a secured creditor. He was treated as

4 & 5 Geo. 5,
c. 59.

holding the guarantee of third persons, and not a security on the property of the debtor. As a general rule he might vote as an unsecured creditor, and prove for the full amount of the bill against all parties liable on it until he received in the whole twenty shillings in the pound. If, however, before proof, he had received or been declared entitled to a dividend from one or other of the estates he could only prove for the balance. See, *e.g.*, *Ex parte Newton* (1880), 16 Ch. D. 330, C. A.; *Ex parte Schofield* (1879), 12 Ch. D. 337, C. A. (bills indorsed and advances made pending discount). The present rule deals only with his right to vote, not with his right to dividends. As to when a bill must be valued as a security for all purposes, see *Ex parte Schofield*, *suprà*, at p. 347, per James, L. J. It seems this is only necessary when bills are deposited undorsed, or indorsed under such circumstances that the indorser is not liable to the deposittee on the indorsement. See further *Williams' Bankruptcy*, ed. 11.

SCHEDULE II., R. 19.

Proof in respect of Distinct Contracts.

Two or more
firms, &c.

19. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts.

Note.—This rule, which reproduces rule 18 of the Act of 1883, is taken from sect. 37 of the Act of 1869, which generalised sect. 152 of the Act of 1861, which only applied to bills and notes. See the history and policy of the enactment discussed by Lord Blackburn in *Banco de Portugal v. Waddell* (1880), 5 App. Cas. at p. 171.

Foreign
bankruptcy
and double
proof.

The object of the enactment is to over-ride the rule forbidding double proof where there are two firms with a common partner. It does not apply to the case of the same firm carrying on business in two places under different names (*Ibid.*). If in such case the foreign estate of the firm is administered abroad, the ordinary rule applies, namely, that "a person who, after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in England, may do so; but he must do so upon the terms of bringing in for the purpose of dividend the sum which he has received abroad" (per Lord Cairns, at p. 167). See further as to this rule, *Ex parte Honey* (1871), L. R. 7 Ch. 178; *Ex parte Stone* (1873), L. R. 8 Ch. 914.

By Rule 252 of the Bankruptcy Rules, 1915, it is provided that, "Where a creditor seeks to prove in respect of a bill of exchange, promissory note, or other negotiable instrument or security on which the debtor is liable, such bill of exchange, note, instrument, or security must, subject to any special order of the Court made to the contrary, be produced to the official receiver, chairman of a meeting, or trustee, as the case may be, before the proof can be admitted either for voting or for dividend." 4 & 5 Geo. 5, c. 59.
Production of bill for proof.

Note.—See *Williams' Bankruptcy*, ed. 11.

By Rule 269 of the Bankruptcy Rules, 1915, it is provided that, "Subject to the provisions of section 70 of the Bills of Exchange Act, 1882, and subject to the power of the Court in any other case on special grounds to order production to be dispensed with, every bill of exchange, promissory note, or other negotiable instrument or security, upon which proof has been made, shall be exhibited to the trustee before payment of dividend thereon, and the amount of dividend paid shall be indorsed on the instrument." Production for dividend.

THE BILLS OF EXCHANGE ACT, 1914.

(4 & 5 GEO. 5, c. 82.)

An Act to make provision in connection with the present war with respect to Bills of Exchange payable outside the British Islands. [18th September, 1914.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Sec. 1. Without prejudice to the operation of subsection (1) of section forty-six of the Bills of Exchange Act, 1882, delay in the presentment for payment of a bill of exchange, where the proper place for payment is outside the British Islands, is excused if the delay is, or has been, due either directly or indirectly to circumstances arising out of Delay in presentment of a bill for payment due to war.
45 & 46 Vict. c. 61.

4 & 5 Geo. 5, the present war, or to the impracticability, owing to similar
c. 82. _____ circumstances, of transmitting the bill to the place of pay-
ment with reasonable safety.

Provision as
to bills of
exchange
lost owing
to war.

Sec. 2. Where, in any action or proceeding upon a bill of exchange payable outside the British Islands, it is shown to the court that the bill has been lost and that the loss can reasonably be presumed to be due to circumstances attributable directly or indirectly to the present war, the court may allow proof of the bill to be given by means of a copy thereof certified by a notary public, or by means of such other evidence as the court think reasonable under the circumstances: Provided that such indemnity be given against the claims of other persons as the court may require.

As to lost bills generally, see sects. 69 and 70 of the Bills of Exchange Act, 1883, *ante*, p. 267.

Duration.

Sec. 3. His Majesty may, by Order in Council, at any time determine the operation of this Act, or provide that this Act shall have effect subject to such limitations as may be contained in the Order; but, subject to the operation of any such Order in Council, this Act shall have effect during the continuance of the present war and for a period of six months thereafter.

Short title.

Sec. 4. This Act may be cited as the Bills of Exchange Act, 1914.

BILLS OF EXCHANGE (TIME OF NOTING) ACT, 1917.

(7 & 8 GEO. 5, c. 48.)

An Act to amend the Bills of Exchange Act, 1882, with respect to the time for noting Bills.

[8th November, 1917.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Time of
noting.
45 & 46 Vict.
c. 61.

Sec. 1. In subsection (4) of section fifty-one of the Bills of Exchange Act, 1882 (which relates to the time of noting a dishonoured bill), the words "it must be noted on the day of its dishonour" shall be repealed, and the following words

shall be substituted therefor, namely, "it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day." 7 & 8 Geo. 5, c. 48.

Sec. 2. This Act may be cited as the Bills of Exchange (Time of Noting) Act, 1917, and shall be construed as one with the Bills of Exchange Act, 1882, and the Bills of Exchange Acts, 1882 and 1906, and this Act may be cited together as the Bills of Exchange Acts, 1882 to 1917. Short title and construction. 6 Edw. 7, c. 17.

THE FINANCE ACT, 1918.

(8 & 9 GEO. 5, c. 15.)

PART IV.

STAMPS.

Sec. 36.—(1.) Twopence shall be substituted for one penny as the stamp duty on all bills of exchange and promissory notes chargeable under the First Schedule to the Stamp Act, 1891, with duty at the rate of one penny and drawn on or after the first day of September, nineteen hundred and eighteen, and twopence shall accordingly be substituted for one penny in sections thirty-four and thirty-eight of the Stamp Act, 1891. Increase of stamp duty on certain bills of exchange.

(2.) The provisions of subsection (2) of section thirty-eight of the Stamp Act, 1891, shall apply so as to enable an adhesive penny stamp to be fixed on any bills of exchange to which that subsection applies being bills which are liable to a duty of twopence under this section and are stamped only with a penny stamp, as they apply with respect to the fixing of a stamp on an unstamped bill.

(3.) Subsection (1) of section thirty-eight of the Stamp Act, 1891, shall not operate so as to render any bill of exchange which is liable to a duty of twopence under this section and is stamped with a penny stamp invalid for any purpose until the first day of December, nineteen hundred and eighteen, if the person who takes or receives the bill fixes thereto an adhesive stamp of one penny and cancels the stamp.

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